The Director of Motor Vehicles, adopting the Proposed Decision of the Hearing Officer, found that: (1) appellant had during April 1971 advertised Datsun pickups available at $2,098; that three persons sought to buy stripped-down Datsuns during that month but were unable to do so; that each, however, bought Datsuns with accessories; that appellant knew of the advertisement and knew that the vehicles, as advertised, would not be sold at the advertised price; that appellant, through his agents, refused to sell at the advertised price in April 1971 and his reason for not doing so was immaterial; (2) appellant failed in 21 instances to give written notice to the department within three days after transfer of vehicles; (3) appellant failed in 12 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 40 days; (4) appellant failed in 34 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days; (5) appellant failed in one instance to mail or deliver reports of sale for vehicle (with documents and fees) to the department within 10 days; and (6) appellant in six instances charged purchasers of vehicles excessive registration fees.

Additional findings were made in pertinent part as follows: appellant, now 33 years of age, has been a motor vehicle dealer in the Modesto area for 13 years; he has

a sizeable business, grossing $2,500,000 in 1971 and employing 35 employees and salesmen; in 1971 appellant sold 1,250 vehicles and his 1972 rate is about the same; evidence concerning timely reporting requirements and payment of fees fairly established that the appellant was negligent in this phase of the operation; appellant's business had been looked over by department investigators in late 1970; numerous instances were found where fee refunds were due purchasers; refund checks were made out but many were not mailed by appellant; instances of fee overcharges indicate appellant was lax in mailing refunds to purchasers.

The penalty imposed by the director was as follows: for false or misleading advertising, 15 days' suspension; for failure to give 3-day notices, 5 days' suspension; for failure to file reports of sale within 20 days, 5 days' suspension; for failure to file reports of sale within 40 days, 5 days' suspension; for failure to file report of sale within 10 days, 5 days' suspension; and for charging excessive registration fees, 5 days' suspension.

It was provided that the 15-day suspension for false or misleading advertising was to run consecutively with all other suspension, while other suspensions were to run concurrently, for a total period of suspension of 20 days.

Essentially this appeal is based on the contentions that the findings are not supported by the weight of the

evidence, the decision is not supported by the findings and that the penalty is not commensurate with the findings. The appeal is limited to the three areas in which the issues were decided adversely to the appellant; i. e., false or misleading advertising, late transfers and overcharge of fees.

Appellant further raises an ancillary issue contending that the hearing officer originally proposed a suspension of 15 days which the director modified to 20 days (by increasing the penalty for false or misleading advertising from 10 to 15 days) without complying with Government Code Section 11517 (b) and (c). From our examination of the record, we are entirely satisfied that appellant's contention is entirely devoid of merit. However, no useful purpose would be served by extended discussion of this issue as it is rendered moot by our decision with respect to the finding of false or misleading advertising.

Section 3054, subsection (d), Vehicle Code, requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72; Holiday Ford v. Department of Motor Vehicles, A-1-69; and Weber and Cooper v. Department of

Motor Vehicles, A-20-71.)

Applying the weight of the evidence rule, we find insufficient support for the Director's Finding IV (false or misleading advertising).

Our concern with the lack of evidence preponderating in favor of the department is grounded in several areas; first, the ambiguity inherent in the advertisement when related to the evidence and the controlling law; second, the paucity of evidence establishing the knowledge or intent requisite to a finding of a violation of Section 11713(a) Vehicle Code; and, third, the comparatively weak and conflicting posture of the probative evidence establishing the false or misleading nature of the advertisement.

The sections of the Vehicle Code which deal with false or misleading advertising (Secs. 11713(a) and (b)) essentially proscribe two courses of conduct. (1) Making any untrue or misleading statements about a vehicle or making such statements as part of an intentional plan or scheme not to sell a vehicle at the advertised price; and (2) advertising for sale a vehicle not on the premises or available to the dealer from the manufacturer or distributor. The advertisement involved read as follows: "'71 Datsun Pickups Now Available. $2098. Thiel Motors. 608 10th St. 524-6304."

The ambiguity which concerns us arises from the use of the words "Now Available" appearing in the advertisement. These

words could reasonably be interpreted as conveying the representation that such vehicles were physically present at the dealer's premises, that the dealer was regularly receiving them from the factory or distributor and could make delivery within an acceptable time or that, on order, they were "available" in that they could be obtained from the factory or distributor. Considering this in light of the evidence, it was established without contradiction that, during April 1971, appellant at times was receiving shipments of these specific vehicles from the factory or distributor. Thus, when viewed against the controlling law, the advertisement was not in contravention of either Section (a) or (b) of 11713 V.C. with regard to availability.

The problem of ambiguity of the advertisement is further compounded by the absence therein of any language whatever with respect to accessories. Consequently, to hold that the advertisement in effect offered '71 Datsun pickups for sale "stripped" (i.e., without accessories) is to resort to speculation, which we will not do. The appellant advertised the price of pickups as $2098, and the evidence amply supports the fact that such vehicles were sold at that price during April 1971, albeit accessories were additional.

The crux of the department's contention, as found established by the director, is that during April 1971 appellant knew of the advertisement but refused to sell the vehicles "stripped" and at the advertised price. The department predicated its case

on the advertisement which appeared in the Modesto Bee on April 2, 27 and 28, 1971. It was established, however, that the same 3-line advertisement appeared not only on these dates but on every day of publication of the paper from December 1, 1970, through July 30, 1971, and was inserted in this manner to obtain a favorable daily advertising rate. It was additionally established that during the entire running of the advertisement, except during April 1971, approximately 26 Datsun pickups were sold, some at $2098 and other at a lesser figure and some that sold at $2098 included accessories such as radios or bumpers. Confirming that such sales were made, appellant on his own behalf testified that if a customer did not want accessories, he could purchase or order a pickup "stripped". Considering all of this in light of our previous discussion, we are not satisfied that the appellant possessed the guilty knowledge or intent as part of a scheme or plan within the contemplation of Section 11713(a) Vehicle Code.

We next turn to the evidentiary posture of the case with particular attention to the findings of the director that, "Three persons in April 1971 sought to buy 'stripped down' Datsuns from respondent for $2098. Each was unable to purchase a vehicle as requested." The three persons referred to were the three witnesses called by the department to establish the false or misleading nature of the advertisement. These were

Mr. Alton, Mr. Jordan and Mrs. Harvey.

Although Mr. Alton testified that he was informed by a salesman that he had to buy an air conditioner or camper shell in order to purchase a vehicle that was then in stock, he also testified that the same salesman told him he could get a "stripped" model, if he "would just wait a little while" at the price of $2098. Mr. Alton also admitted that at the time he first considered buying a pickup, he wanted a radio and wrap-around bumper.

As to Mr. Jordan, at the time he visited appellant's premises, he advised the salesman he would like to have a pickup "just as it comes", which meant to convey "without bumper". At that time, all they had was a demonstrator. Subsequently he was called by the salesman who informed him that a purchaser had backed out of a sale and that a pickup was available but that it was equipped with a bumper and radio. Mr. Jordan replied, "Fine, that's all right. I will take it." Prior to making the purchase, he had had no discussion with anyone at Thiel Motors as to whether or not he had to purchase extra equipment.

Lastly, as to Mrs. Harvey, she and her son went to Thiel Motors to buy a pickup with as few accessories as they could. They didn't want a radio or bumper. Although she was told she would have to buy an air conditioner, radio and bumper to

get one of the pickups on the lot, she did not ask if she could order one without accessories. They paid $2098 for the pickup plus the additional cost of the accessories.

Of significance is the fact that none of the three witnesses went to Thiel Motors in response to the advertisement although Mr. Alton and Mrs. Harvey subsequently read it. It is evident that none of the witnesses were misled by the advertisement; none requested to place an order for a "stripped" vehicle; Mr. Alton was told he could get one if he waited a little while; the sale price of the pickup, without accessories, was $2098; and both Mr. Alton and Mr. Jordan were completely satisfied with buying a radio and bumper.

In our view of the sum total of the evidence, there is a lack of evidentiary support for a finding that appellant advertised falsely or in a manner to mislead the public.

Accordingly, Findings of Fact IV and Determination of Issues II are reversed. The remaining findings of fact and determination of issues are affirmed.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the Decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The vehicle dealer's license, certificate and special plates (D-5022 and MC-904) heretofore issued to appellant,

Don Lee Thiel, dba Thiel Motors, are suspended for a period of five (5) days, with three (3) days of the suspension stayed for a period of one year during which time appellant's license, certificate and special plates shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective December 10, 1973.

PASCAL B. DILDAY

JOHN ONESIAN

THOMAS KALLAY

ROBERT A. SMITH

AUDREY B. JONES

MELECIO H. JACABAN

W. H. "Hal" McBRIDE

WINFIELD J. TUTTLE

A-33-72

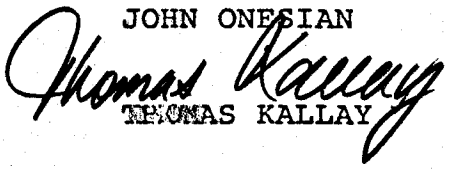
This Final Order shall become effective _____.

PASCAL B. DILDAY

AUDREY B. JONES

JOHN ONESIAN

MELECIO H. JACABAN



THOMAS KALLAY

W. H. "Hal" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-33-72

This Final Order shall become effective _____.

PASCAL B. DILDAY

AUDREY B. JONES Audrey B Jones

JOHN ONESIAN

MELECIO H. JACABAN

THOMAS KALLAY

W. H. "Hal" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-33-72

This Final Order shall become effective _____.

PASCAL B. DILDAY

AUDREY B. JONES

JOHN ONESIAN

MELECIO H. JACABAN

THOMAS KALLAY

W. H. "Hal" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-33-72

This Final Order shall become effective_____.

PASCAL B. DILDAY

JOHN ONESIAN

THOMAS KALLAY

ROBERT A. SMITH

AUDREY B. JONES

MELECIO H. JACABAN

W. H. "Hal" McBRIDE

WINFIELD J. TUTTLE

A-33-72

This Final Order shall become effective _____.

PASCAL B. DILDAY

AUDREY B. JONES

JOHN ONESIAN

MELECIO H. JACABAN

THOMAS KALLAY

W. H. "Hal" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-33-72

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THOMAS KALLAY

ROBERT A. SMITH

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WINFIELD J. TUTTLE

A-33-72

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WINFIELD J. TUTTLE

A-33-72

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THOMAS KALLAY

W. H. "Hal" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-33-72

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of DON LEE THIEL, dba THIEL MOTORS, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-33-72 FILED: November 30, 1973

Time and Place of Hearing:	October 10, 1973, 10:30 a.m. 2570 - 24th St., Room 200A Sacramento, CA 95818
For the Appellant:	Harold C. Wright Attorney at Law Brown, Wright & Kucera 2600 El Camino Real, Suite 4 Palo Alto, CA 94306
For the Respondent:	Honorable Evelle J. Younger Attorney General By: Joel S. Primes Deputy Attorney General

CORRECTION OF FINAL ORDER

The Final Order of the New Car Dealers Policy and Appeals Board filed in the above-entitled case November 23, 1973, is hereby corrected:

On page one, the word "corporate" is deleted and the word "dealer's" is substituted therefor.

The following language is deleted from page 10:

"...and its officers, directors and stockholders..." and "...or any of the appellant's officers, directors or stockholders...".

PASCAL B. DILDAY	AUDREY B. JONES
JOHN ONESIAN	MELECIO H. JACABAN
THOMAS KALLAY	W. H. "HAL" McBRIDE
ROBERT A. SMITH	WINFIELD J. TUTTLE

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809

Telephone: (916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

MONDAY INVESTMENTS, INC., dba DON MONDAY BUICK, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	No. A-34-73 Filed: May 30, 1973

Time and Place of Hearing:	May 9, 1973, 10:30 a.m. City Council Chambers City Hall 1685 Main Street Santa Monica, California
For Appellant:	John A. Wellcome Attorney at Law Heily, Blase, Ellison & Wellcome 220 South A Street Oxnard, CA 93030
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER

This case concerns certain advertising practices of Don Monday Buick, hereinafter referred to as "appellant". The

Director of Motor Vehicles, proceeding via the Administrative Procedure Act, found that appellant had violated Section 11713(a) Vehicle Code[1/] as implemented by departmental regulations, namely 13 Cal.Adm. Code §432.01,[2/] by identifying vehicles in advertisements by only the last four digits of the vehicles' identification numbers, rather than the complete identification numbers, and 13 Cal.Adm. Code §432.00,[3/] by advertising new prior-year model vehicles without identifying them as prior-year models.

The director ordered appellant's license be suspended for a period of 23 days with 20 days stayed for one year subject to the condition appellant obey all laws of the United States, the State of California and its political sub-divisions and obey all

---

1/ This section provides it is unlawful for a vehicle dealer --

"To make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; or to so make or disseminate or cause to be so disseminated any such statement as part of a plan or scheme with the intent not to sell any vehicle or service so advertised at the price stated therein, or as so advertised."

2/ Regulation 432.01 provides as follows:

"Any specific vehicle advertised for sale by a dealer shall be identified by either its vehicle identification number or license number so that a prospective purchaser may recognize it as the vehicle advertised for sale."

3/ Regulation 432.00 provides, in relevant part, as follows:

"When a prior-year model is advertised as a new vehicle, the fact that it is a prior-year model shall also be advertised."

rules and regulations of the Department of Motor Vehicles.

On appeal, appellant contends that the finding of a violation of Section 432.01 is not supported by substantial evidence; that Section 432.00 is beyond the purview of the applicable statute and is, therefore invalid; that there is no evidence in the record that the statements objected to by the department were misleading; that there was a complete lack of findings of fact to support a violation of Section 11713 Vehicle Code; and that the penalty is excessive.

Appellant does not dispute that it advertised prior-year models without revealing that fact in the advertisement. Neither does appellant dispute that it used only partial vehicle identification numbers in its advertisements.

IS THE DIRECTOR'S FINDING THAT APPELLANT VIOLATED REGULATION 432.01 BY USING THE LAST FOUR DIGITS OF THE VEHICLE IDENTIFICATION NUMBERS TO IDENTIFY VEHICLES IN ADVERTISEMENTS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

We were faced with an analogous situation in Weber and Cooper Lincoln-Mercury v. Department of Motor Vehicles, A-20-71. There, appellant used the stock numbers it assigned to vehicles in its inventory as the method of identifying those vehicles in its advertisements and the director found this practice to be in violation of Regulation 432.01. On appeal, we reversed, on the basis that the evidence failed to support such findings.

We pointed out that, in each of the advertisements bearing

a stock number, the vehicles were also described by make, year, model and physical characteristics. We concluded that a prospective automobile purchaser would not be led astray or deceived by the identification method used and that Section 11713(a) had not been violated. (There was no evidence that the stock numbers had been switched for the purpose of confusing buyers or that the stock numbers were inaccurate.)

In Weber and Cooper, we also noted that the purpose of Regulation 432.01 is stated in the text of the regulation itself; i.e., "...so that a prospective purchaser may recognize it as the vehicle advertised for sale." We then stated, "We view that phraseology as qualifying the requirement of the regulation that an advertisement must contain either the vehicle's identification number or license number. In other words, if the advertisement reasonably permits a prospective purchaser to identify the advertised vehicle through means other than through the use of a license number or an identification number, such advertisement does not conflict with Regulation 432.01."

We find the manner in which this appellant identified vehicles in its advertisements falls within the Weber and Cooper rule. In each instance, the last four digits of the vehicle identification number were given. The make of the vehicle (Buick) was given as was the model (Estate Wagon or Skylark). In each instance the vehicle was described as "new".

In our view, a reasonable buyer, having the descriptive information contained in the advertisements, should be able to readily identify the particular vehicle.

Counsel for the department concedes that the chances of finding the same make and model vehicle with the same last four digits of the vehicle identification number at the same dealership are "slim". With this, we heartily concur. However, respondent urges that by omitting that part of the vehicle identification number which appellant omitted from its advertisements, a knowledgable person reading the advertisement could not ascertain the fact that the vehicles were prior-year models, all of which made the advertisements misleading in that respect, regardless of the fact that the vehicle could be identified by the last four digits. This is true. The omitted numbers did include those which Buick uses as a designation of the year model. However, few people other than those in the industry and, perhaps, in the Department of Motor Vehicles would be aware of the significance of that part of the Buick identification number that reflects the year model. It is also true that enforcement of Section 11713(a) on the facts of this case would have been enhanced had the full number, revealing the year model, been put into the advertisements, because appellant's competitors could have ascertained from the number that appellant was advertising prior-year model vehicles without revealing that fact in the advertisements in a manner that the average citizen could understand.

However, Section 432.01 was not intended to proscribe advertising practices which mislead in that manner; Section 432.01 is concerned with identification of the vehicle from the advertisement. To the extent that respondent's argument is valid, the concealment from the expert of the year model of the vehicle by deletion of the first part of the identification numbers would be in violation of Section 11713(a), not Section 432.01.

We, therefore, amend Determination of Issues I to read as follows:

> "The dealer's license, certificate and special plates (D-6912) heretofor issued to respondent [appellant] Monday Investments, Inc., dba Don Monday Buick are subject to disciplinary action pursuant to the provisions of Section 11713(a) of the California Vehicle Code as implemented by Section 432.00 of Title 13 of the California Administrative Code, in conjunction with Section 11705(a)(9) of the California Vehicle Code by reason of the facts found in Finding IV and V."
>
> We delete in its entirety Determination of Issues III.

IS REGULATION 432.00 BEYOND THE PURVIEW OF THE APPLICABLE STATUTES?

Appellant would have us regard Regulation 432.00 as merely an opinion of the department having no legal force or effect. Appellant contends that the regulation extends the scope of the statute and, therefore, is not valid. We disagree.

The Legislature has not seen fit to identify and legislate on all forms of deceptive advertising. It has decreed, as far as motor vehicle advertising is concerned, that any advertising that is either untrue or misleading is objectionable and has delegated to the Director of Motor Vehicles, via Section 1651 Vehicle Code, the authority to adopt regulations identifying kinds of advertising which, in the director's judgment, are either untrue or misleading.

Section 432.00 is entirely appropriate and carries out the purpose of an administrative regulation, namely, of implementing, interpreting, making specific or otherwise clarifying the provisions of a statute. Section 432.00 is consistent and not in conflict with the statute and is reasonably necessary to effectuate the purpose of the statute. (Rosas v. Montgomery, 10 Cal.App.3d 77.)

A reviewing body is obligated to undertake a two-pronged inquiry when reviewing the propriety of administrative regulations. It must first determine whether the regulation lies within the scope of authority conferred and, if so, it must determine whether the regulation is reasonably necessary to effectuate the purpose of the statute. (Ralph's Grocery Company v. Reimel, 69 Cal.2d 172; Morse v. Williams, 67 Cal.2d 733.) Regulation 432.00 clearly meets the two-pronged test of the Ralph's case.

Appellant makes no contention that there were any procedural irregularities in the adoption of Regulation 432.00 and we conclude our remarks on the issue by noting that a properly

adopted regulation has the force and effect of law. (Alta Dena Dairy v. County of San Diego, 271 Cal.App.2d 66.) Thus, unless some competent authority finds the regulation to be an unlawful exercise of administrative authority, it is as binding as the statute giving it birth.

IS PROOF THAT A MEMBER OF THE PUBLIC WAS ACTUALLY MISLED REQUISITE TO A FINDING OF A VIOLATION OF SECTION 11713(a) VEHICLE CODE?

Appellant contends that whether or not a statement is misleading is an issue of fact and that the department produced no evidence on the issue. Appellant cites no authority to support its proposition that the department had the burden of showing that someone was misled by appellant's advertising and overlooks case law to the contrary. (Ex parte O'Connor, 80 Cal.App. 647.) The burden on the department was to show that the advertisements ran afoul of the law; it had no burden to produce a member of the public that was actually misled thereby.

ALLEGATION OF DEFECTIVE FINDINGS

Appellant alleges that there is no finding of fact that appellant published "untrue or misleading" statements and that there is no finding that appellant published a misleading or untrue statement "...which is known, or which by the exercise of reasonable care should be known..." to be untrue or misleading.

An ancillary allegation is that no evidence was introduced by the department to show what was known or should have been known by appellant with reference to its advertising.

Focusing our attention on the allegation that the findings fail to set forth what appellant knew or should have known regarding its advertising, our first observation is that the findings of an administrative agency need not be stated with the formality required in judicial proceedings. The basic purposes of findings by an administrative agency are to aid the reviewing body in determining whether there is sufficient evidence to support the findings, to enable the court to examine the decision of the agency in order to determine whether the decision is based upon a proper principle, and to apprise the litigants in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, on what grounds. (Swars v. Council of City of Vallejo, 33 Cal.2d 867.)

In the case before us, certain findings of fact were made with reference to the manner in which appellant advertised vehicles for sale. From these findings, certain determinations of issues followed. These determinations recited that the facts as found violated designated sections of the Vehicle Code and the Administrative Code and that the appellant's license was subject to discipline. The clear implication from this is

that the facts as found constituted untrue or misleading advertising and that appellant either knew or should have known that its advertising was either untrue or misleading.

Directing our attention to the allegation that there was no evidence of what appellant knew or should have known regarding the condition of its advertising, we merely remark that this contention overlooks the fact that a dealership is responsible for knowing the statutes and regulations controlling the business and should have knowledge of the contents of its advertisements. An examination of appellant's advertisements in light of the controlling statute, as implemented by regulations, would have shown appellant that its advertisements were not in keeping with legal requirements.

PENALTY

In our view, appellant's practice of advertising prior-year model vehicles without specifying that they were prior-year models was a deliberate and planned artifice to mislead prospective purchasers into believing that the heavily discounted vehicles were 1972-year models when, in fact, they were 1971 models and to give appellant an unfair business advantage in a highly competitive enterprise. It is particularly significant that the advertisements concerning the 1971-year model vehicles are a part of the advertisements for the 1972 models and nowhere in the advertisements is there

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective June 13, 1973.

GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

I concur with the comments of Mr. Dilday, except I would merely stay the entire 23-day suspension.

ROBERT A. SMITH

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This order shall become effective _____.

Gilbert D. Ashcom

GILBERT D. ASHCOM

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WINFIELD J. TUTTLE

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AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

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PASCAL B. DILDAY

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We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective June 13, 1973.

GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective _____.

GILBERT D. ASHCOM

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WINFIELD J. TUTTLE

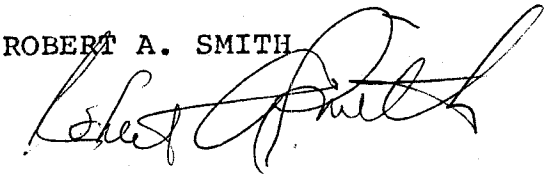
D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

I concur with the comments of Mr. Dilday, except I would merely stay the entire 23-day suspension.

ROBERT A. SMITH



2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of SUBURBAN MOTORS, INC., dba SUBURBAN FORD, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-35-73 Filed: November 19, 1973

Time and Place of Hearing:	September 12, 1973, 1:30 p.m. State Building, Room 1157 350 McAllister Street San Francisco, California
For Appellant:	John B. Wagaman Attorney at Law 6733 Fair Oaks Boulevard, Suite 3 Carmichael, CA 95608
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER

Suburban Motors, Inc., dba Suburban Ford, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles found that appellant had: (1) failed in four instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 431 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days; (3) failed in three instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 30 days; (4) in 158 instances charged purchasers of vehicles excessive registration fees.

The director further found that the acts described in findings (1), (2), (3) and (4) above were performed by employees or officers of appellant within the course of his or her employment; that appellant retails nearly five thousand cars a year, including over two thousand used ones. In mitigation, appellant produced evidence that it had promptly refunded the overcharges; that the business manager and the "DMV Girl" employed by appellant had jointly decided to ignore discrepancies of three dollars or less between the fees charged to the customers and those determined by the department, on the theory that overcharges and undercharges more or less balanced each other; that there had been no complaints; that this practice has been stopped so that refunds are made in all instances in which the fee charged to the buyer exceeds that determined by the department; that measured against

appellant's overall operation, the practice of ignoring small overcharges could not and did not stem from a desire to make a few extra dollars but represented an effort toward greater efficiency; that the delays in forwarding documents to the department were caused by a variety of factors including overwork, and a desire to wait for credit or title clearances or for the completion of repairs; that in many cases, the delays amounted to just a few days beyond the statutory limits; and that appellant is conscientiously trying to do what it can, including employment of sufficient help, to process all documents within the time prescribed by law.

The director, adopting the proposed decision of the hearing officer, imposed the following penalty:

Revocation of dealer's license, certificate and special plates, with a stay for one year and one year's probation on the usual terms and conditions, plus a three-day actual suspension.

Appellant has appealed to this board on the grounds that the findings are not supported by the weight of the evidence; that the decision is not supported by the findings; and that the penalty is not commensurate with the findings.

The main thrust of appellant's argument in support of his appeal appears, in essence, to be three-fold: first, Sections 4456 and 4456.5 of the Vehicle Code are so vague and uncertain as to be unenforceable and unconstitutional; second, that the tender to the department of a check in the amount of

$1,305.00 intended as and for the $3.00 forfeiture fee specified in Section 4456.5 Vehicle Code for each of the violations of Sections 5901, 4456 and 5753 Vehicle Code precludes imposition of any further penalties for these offenses; and, third, appellant corporation is not responsible for the acts of its employees or officers.

Before addressing the issues raised by this appeal, two collateral matters require brief discussion.

Pursuant to Section 3054(e) Vehicle Code and 568(e) of the department's regulations, appellant requested and was granted the right to augment the record. In pursuance thereof, the appellant introduced in evidence a form entitled "Report of Deposit Fees" used by the department when returning incomplete applications for registration. The particular documentary evidence introduced was furnished by appellant's "DMV Girl" from a file that had been returned to the appellant in August 1973. The form recites in pertinent part that it, together with attached documents and items checked, "Must be returned to the Department of Motor Vehicles within 60 days. Credit for fees deposited will then be allowed."

During his offer of proof, counsel for appellant represented that the use of the form by the department first came to his attention during a discussion with appellant's "DMV girl" after the administrative hearing. Counsel further explicitly stated that the evidence was offered only on the

general issue of whether or not Section 4456 Vehicle Code is vague and uncertain and not on any other issue. Counsel for the department stipulated that the document in question was attached to any transfer items returned by the field offices of the Department of Motor Vehicles until sometime in August 1973, when the words on the form "within 60 days" were deleted. Further reference to this augmenting evidence will be made in our discussion of the issue of vagueness and uncertainty of Sections 4456 and 4456.5 Vehicle Code.

The second collateral matter concerns the finding of the hearing officer that on October 24, 1972, the appellant tendered to the department $1,305.00, representing a $3.00 forfeiture fee for each of the late reporting violations except the three 30-day violations for which $3.00 was previously paid. At the close of the administrative proceeding, the hearing officer permitted both sides to submit written argument. Attached to appellant's [respondent's] answering argument was appellant's check, dated October 24, 1972, in the amount of $1,305.00, made out to the Department of Motor Vehicles. (Note: the original check, unnegotiated, is presently filed as part of the entire administrative record.)

For our purposes, we need not decide whether the check

was properly received as evidence[1/] nor whether tender was made to the department.[2/] We are satisfied to rest on the fact that the offer of the check in the sum of $1,305.00 as the $3.00 forfeiture fee for the late reporting violations was untimely and consequently must be rejected. This aspect of the case will be further considered in our discussion of the issues raised by the appeal.

This appeal raises the question of whether the findings are supported by the weight of the evidence in light of the whole evidence and whether the decision is supported by the findings. These questions are considered simultaneously as appellant's arguments with respect to each are interrelated and overlap in many substantive aspects. As indicated previously, appellant's arguments are addressed to the vagueness and uncertainty of Section 4456 and 4456.5 Vehicle Code, the effect of the tender of payment of the $3.00 forfeitures on additional penalty action and the lack of culpability of the corporation for acts of its employees.

The last of these contentions may be disposed of as being without merit by our observation in Zar Motors v. Department of Motor Vehicles, A-17-71, that it is well settled that the

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1/ In analogous situations under statutes providing for review of records as certified, the courts will not consider evidence in arguments. (NLRB v. Crown Can Co., 138 F.2d, 263 (8th Cir. 1943); certiorari denied, 321 U. S. 769 (1944).

2/ A hearing officer assigned to conduct an administrative hearing is deemed an officer of the Office of Administrative Hearings and not of the agency to which he is assigned. (Govt.Code §11370.3.)

revocation or suspension of a license is not penal in nature (citing Meade v. State Collection Agency Board, 181 Cal.App.2d 774) and by our holding in Imperial Motors v. Department of Motor Vehicles, A-18-72 wherein we stated:

> "A corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline." (See also Bishop-Hansel Ford v. Department of Motor Vehicles, A-39-73; Main Toyota, Inc. v. Department of Motor Vehicles, A-37-73; cf. Rich Motor Company v. Department of Motor Vehicles, A-16-71.)

Turning next to the question of vagueness and uncertainty of Sections 4456 and 4456.5 of the Vehicle Code, appellant in actuality, raises the issue of the constitutionality of the statute. The weight of authority supports the position that the power to determine the constitutionality of legislation is not committed to administrative agencies. (See Public Utility Commission v. U.S. (1918) 355 U.S. 534, 539; Panitz v. District of Columbia (DCCir 1940) 112 F.2d 39, 42; 3 Davis, Administrative Law Treatise, §20.04 (1958); cf. Rubin v. Board of Directors (1940), 16 C.2d 119.) Accordingly, we make no findings or determinations concerning the constitutionality of the cited sections of the Vehicle Code. Nevertheless, in order to determine if the evidence supports the findings, it is necessary that we consider the interpretation, intent and clarity of the questioned legislation.

At the outset it is pertinent to observe that statutes

must be given a fair and reasonable interpretation with due regard to the language used and the purpose to be accomplished (45 Cal.Jur.2d §113); statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers -- one that is practical rather than technical, that will lead to a wise policy rather than mischief or absurdity (45 Cal.Jur.2d §116); and a statute must be construed so as to harmonize its various parts or sections without doing violence to the language, spirit or purpose of the act (45 Cal.Jur.2d §118; Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907.)

In Coberly Ford v. Department of Motor Vehicles, A-25-72, citing numerous cases previously heard on appeal, we reviewed in detail some of the history of the legislation requiring timely and accurate reporting, the importance of compliance therewith and the dire consequences to the public resulting from non-compliance with such requirements. The culmination of all of this is contained in Sections 4456, 4456.5 and 5901 [3/] Vehicle Code, the scheme of which is to assure that title documents are handled in an orderly manner so that ownership of motor vehicles is a matter of public record within a reasonable time. (Evilsizor v. Department of Motor Vehicles (1967) 25 Cal.App.2d 216.)

3/ Section 5901 of the Vehicle Code is the section which requires written notice to the department within three days of transfer of a vehicle.

As we read sections 4456 and 4456.5, the language is certain and unambiguous that the basic intent is to give the dealer a 20-day period in which to collect and submit to the department the various documents needed to register or transfer title along with the fees and penalties, if any, that are required for licensing and registration. If the dealer needs additional time, Section 4456.5(a) provides that he "shall, upon payment of a forfeiture fee of three dollars ($3) to the department, be allowed an additional 10 days to present to the department an application and documents in acceptable form." (Underscoring supplied.) Paragraph (b) of Section 4456.5 then goes on to state that following payment of the three dollar ($3) forfeiture fee and upon a showing of diligent effort within such 30 days to obtain requisite information or documents to enable transfer, the dealer shall be allowed an additional 10 days to file, thus extending his total filing time to 40 days.

It is clear, when read in context, that the payment of the three dollar ($3) forfeiture fee, provided for in sub-paragraph (a), is a condition precedent to obtaining the 10-day extension to the basic 20-day filing period. Payment of the forfeiture fee therefore must be timely.

What then of appellant's contention that the statute is rendered uncertain by the department's use of a form requesting

return of rejected applications within 60 days? This is the form received by the board in augmentation of the record. We need only comment that this form was furnished to appellant's counsel by appellant's "DMV girl" who testified at length at the administrative hearing. She testified that she had almost 20 years of experience in handling transfers, titles and "DMV" work and had been employed by appellant in such capacity for almost 10 years. Regarding the late reports of sale, she testified that some involved delays in getting papers from former owners of a traded vehicle; some involved delays as a result of "unwinds" and some delays were due to heavy workload. Significantly, her testimony established that with the aid of notebooks (introduced in evidence), she had a set pattern for calculating when the 20-day period for filing was up and if there was error, she would take the report to the department and pay the fees and forfeitures.

Nowhere in the testimony of the "DMV girl" do we find any hint of an idea that she or anyone else in appellant's organization was misled by receipt of the department's form into believing that the filing periods provided for in Sections 4456 and 4456.5 Vehicle Code were extended to 60 days' nor do we find any representation by appellant during augmentation of the record that the department's form resulted in any confusion or uncertainty as to the reporting requirements

set forth in the Vehicle Code.

Weighing the total evidence, we attach minimal significance to the form offered solely on the general issue of whether or not Section 4456 Vehicle Code is vague and uncertain. The relevance of the form to any specific item in the accusation was neither raised nor established by the appellant and requires no discussion.

We turn next to the matter of the tender of the $1,305.00 which appellant has represented to be the three dollar ($3) forfeiture fees described in Section 4456.5 Vehicle Code. In light of our conclusion that under this section the forfeiture must be paid on or before expiration of the basic 20-day period and is a condition precedent to obtaining a 10-day extension, it follows, contrary to appellant's argument, that such fee may not be paid at any time. If we were to agree with appellant's contention, a dealer could completely avoid his responsibility for timely reporting and, as in this case, wait until the completion of the administrative hearing to pay the forfeiture and then assert complete immunity from license discipline. This would completely circumvent the clear intent and purpose of the reporting requirements of the Vehicle Code and would lead to absurdity. Such a result cannot obtain.

Appellant points to the language of Paragraph (c), Section 4456.5 Vehicle Code, which states that, "notwithstanding

any other provision of this code, the three dollar ($3) forfeiture payment provided by this section shall constitute the sole cause of action arising from non-compliance with paragraphs (3) and (4) of subdivision (c) of Section 4456[4/] by the dealer."

Viewing this section as it applies to subparagraph (4), the timely payment of the three dollar ($3) forfeiture fee only precludes license discipline for failing to file within 20 days but does not preclude action for failing to file within 30 or 40 days as the case may be. If this provision were not included, a dealer could conceivably pay the three dollar ($3) forfeiture fee on or before the 20th day, file within the 10-day extension period and still be in violation of the code for failing to file within 20 days.

As to the reference in the section to subparagraph (3), we agree that there exists some internal conflict in language. This is so because Section 4456.5 states that the three dollar ($3) forfeiture fee can be paid only if the dealer has filed the 3-day notice (Ref. Sec. 5901 V.C.). It is evident, therefore, that payment of the three dollar ($3) forfeiture fee could not be the sole cause of action for failure to file the 3-day

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4/ Section 4456(c)(3) V.C. provides that: "The sale of the vehicle shall be reported to the department as required by Section 5901."

Section 4456(c)(4) V.C. provides that: "An application in proper form to register the vehicle or to effect transfer of ownership, together with required supporting documents, shall be made by the dealer to the department on behalf of the purchaser within 20 days of the sale."

notice. We are not confronted here, however,with the task of reconciling this language as appellant's tender of payment of forfeiture fees was untimely and the issue in this case with respect to Section 5901 V.C. becomes academic.

To avoid any misapprehension in this area, we take cognizance of the three instances wherein the three dollar ($3) forfeiture fees were timely paid (Items 405, 406 and 407 of Ex. B to the accusation). However, these items were not made the subject of discipline for failure to file 3-day notices in violation of Section 5901 Vehicle Code but rather were charged as violations of Section 4456.5 for failure to file within 30 days. We note here that the record of transcript is devoid of evidence of diligent effort of any sort with respect to these items. Accordingly, and without further discussion, we deem appellant's added attack on the language of Section 4456.5(b) Vehicle Code, which permits an extension of filing time to 40 days on a showing of "diligent effort" to be without merit.

In light of the foregoing and the conclusions reached therein and having exercised our independent judgment, we find that the findings are supported by the weight of the evidence in light of the whole evidence and that the decision is supported by the findings.

Having duly considered all the evidence before us and having given due consideration to all the matters presented in extenuation and mitigation, we find the penalty imposed by

the Director of Motor Vehicles to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Order shall become effective December 5, 1973.

PASCAL B. DILDAY

WINFIELD J. TUTTLE

W. H. "HAL" McBRIDE

AUDREY B. JONES

THOMAS KALLAY

ROBERT A. SMITH

A-35-73

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of RUFFNER'S TRAILERS, INC., A California corporation, Appellant, DEPARTMENT OF MOTOR VEHICLES, OF THE STATE OF CALIFORNIA, Respondent.	No. A-36-73 Filed: August 30, 1973

Time and Place of Hearing:	July 11, 1973, 1:30 p.m. Room 133, Resources Building 1416 Ninth Street Sacramento, California
For Appellant:	Bryce H. Neff Attorney at Law 18345 Ventura Boulevard, Suite 508 Tarzana, CA 91356
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Leo Bingham Staff Counsel

FINAL ORDER

Ruffner's Trailers, Inc., hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor

Vehicles following proceedings pursuant to Section 1500 et seq. Government Code.

The Director of Motor Vehicles found that appellant had:

1. Caused to be disconnected the odometers of one Ford pickup truck, two Utopia motor homes and five Lifetime motor homes, thereby, violating Section 11713(n) Vehicle Code; and
2. Operated a Ford pickup truck on the highways under appellant's dealer plates, thereby, violating Section 11705 Vehicle Code.

The director further found that the motor homes were new vehicles and that the odometers had been disconnected at the factory; that appellant was of the mistaken opinion that this practice was permissible in order to protect the full warranty of the customer; and that a few days prior to the inspection by department investigators, appellant had been advised that odometers would no longer be disconnected at the factory which produces Lifetime motor homes.

The director ordered appellant's license, certificate and special plates suspended for a period of 30 days with 17 days of the suspension stayed for a period of one year, during which time appellant would be on probation subject to the

condition appellant obey all laws of the United States, the State of California and its political subdivisions, and the rules and regulations of the Department of Motor Vehicles.

In amplification of his order and the terms of probation, the director further specified, with respect to the 13-day suspension to be effectuated, the number of days' suspension allocated to each violation as follows:

> 5 days' suspension for the odometer disconnect of the Ford pickup; 5 days' suspension for the odometer disconnects of the five motor homes and 3 days' suspension for the misuse of the dealer plates.

The appellant has appealed on the grounds that: (1) The department has proceeded without or in excess of its jurisdiction; and (2) the department has proceeded in a manner contrary to law. Specifically, appellant contends the director's order imposes a sanction against the license of a corporation which was not a party to this case.

We will first address the issue raised by the appeal[1/] and then consider whether the findings are supported by the evidence.

1/ The appeal was considered, without oral argument, on the briefs filed by appellant and respondent.

DOES THE DIRECTOR'S ORDER IMPOSE SANCTIONS AGAINST A CORPORATION NOT A PARTY TO THE CASE?

The facts pertinent to this issue are as follows:

The department, to establish the record of pleadings in this case, introduced in evidence the accusation, together with other documents not here relevant. The hearing officer thereafter, without objection by appellant, took official notice of paragraphs I and II of the accusation. Paragraph II recites:

> "That at all times mentioned herein, Respondent [Appellant] RUFFNER'S TRAILERS, INC., a California corporation, was doing business at 7755 Sepulveda Boulevard, Van Nuys, 9730 Garvey Boulevard, South El Monte, and 8605 Artesia Boulevard, Bellflower, County of Los Angeles, State of California, operating said business under and by virtue of a dealer's license, certificate and special plates (D-8944 & TR-56) duly issued to it by the Department of Motor Vehicles."

The findings in Paragraph II of the Director's Decision contain the identical language recited in the Accusation and as above set forth.

The only evidence introduced by the department was an affidavit of a departmental investigator, Mr. Whetmore, which attests that he and another investigator called at appellant's place of business at 7755 Sepulveda Boulevard, Van Nuys, where he inspected the motor vehicles and found violations which gave rise to the accusation in this case.

Appellant now contends that he was not doing business at

the matters which he now claims are erroneous. Even assuming that the two operating locations were erroneously included in the findings, we would conclude that appellant's contention is without merit. Sanctions imposed by Section 11705 Vehicle Code are against a dealer's license and not against a geographical location. Under the decision, dealer license, certificate and special plates D-8944 and TR-56 are ordered suspended for the stated period irrespective of where Ruffner's Trailers, Inc., is doing business.

We observed that if any cause to complain exists because of the decision, Ruffner's Trailer Sales, Inc., would be the proper party in interest and not the appellant. In the case before us, Ruffner's Trailer Sales, Inc. (dealer license, certificate and special plates D-1276 and TR-1840) was not named in the accusation, did not appear as a party in interest at the hearing and is not included in or affected by the director's decision. For the reasons stated, the issue raised by the appellant is deemed to be without merit.

ARE THE DIRECTOR'S FINDINGS SUPPORTED BY THE EVIDENCE?

Section 3054(d) Vehicle Code requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to weigh the evidence to resolve conflicts in our own minds, draw such inferences as

the matters which he now claims are erroneous. Even assuming that the two operating locations were erroneously included in the findings, we would conclude that appellant's contention is without merit. Sanctions imposed by Section 11705 Vehicle Code are against a dealer's license and not against a geographical location. Under the decision, dealer license, certificate and special plates D-8944 and TR-56 are ordered suspended for the stated period irrespective of where Ruffner's Trailers, Inc., is doing business.

We observed that if any cause to complain exists because of the decision, Ruffner's Trailer Sales, Inc., would be the proper party in interest and not the appellant. In the case before us, Ruffner's Trailer Sales, Inc. (dealer license, certificate and special plates D-1276 and TR-1840) was not named in the accusation, did not appear as a party in interest at the hearing and is not included in or affected by the director's decision. For the reasons stated, the issue raised by the appellant is deemed to be without merit.

ARE THE DIRECTOR'S FINDINGS SUPPORTED BY THE EVIDENCE?

Section 3054(d) Vehicle Code requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to weigh the evidence to resolve conflicts in our own minds, draw such inferences as

we believe to be reasonable and make our own determination regarding the credibility of witnesses and testimony in the transcript of the administrative proceedings. (Holiday Ford v. Department of Motor Vehicles, A-1-69; Weber and Cooper v. Department of Motor Vehicles, A-20-71.)

Applying the weight of the evidence rule, we find sufficient support for the director's findings only with respect to so much of Finding IV as finds that appellant "caused to be disconnected the odometer of the vehicle described as Item 1 in Exhibit A (Ford pickup), which did reduce the mileage indicated on the odometer gauge, and Finding V (misuse of dealer's plates). We do not find sufficient support for Finding IV that the appellant "caused to be disconnected" the odometers of the vehicles described as items 2 through 8 in Exhibit A (5 Lifetime motor homes and 2 Utopia motor homes.)[2/]

With reference to the Lifetime motor homes, the department's only evidence to support the findings were the statements contained in the affidavit of the departmental investigator, John Whetmore. He attested that there were certain vehicles on appellant's lot on a certain date with

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2/ While Section 11713(n) and Section 28051 Vehicle Code speak respectively of unlawfulness of a "holder of a license" and "any person" to disconnect an odometer, we need not concern ourselves here with the wording of the finding "caused to be disconnected" as a licensee is responsible for the acts of his employees (Reimel vs. Board of Alcoholic Beverage Control, 252 Cal.App.2nd 520).

disconnected odometers and that Dale, an officer of appellant corporation, stated that he [Dale] was aware the odometers were disconnected and that he "accepts full responsibility." According to Whetmore, Dale said the vehicles were driven from Iowa to California with the odometers disconnected "on his [Dale's] orders."

The statute with which we are herein involved is Section 11713(n) Vehicle Code (see Section 28051 V.C.[3/]). Section 11713(n) reads in pertinent part as follows:

> "It shall be unlawful and a violation of this code for the holder of any license issued under this article: . . . (n) To disconnect, turn back, or reset the odometer of any motor vehicle in violation of Section . . . 20851."

Having a vehicle with a disconnected odometer in one's inventory and being aware of that fact is not, in and of itself, a basis for license discipline. Neither does a basis for license discipline necessarily arise from appellant's officer accepting responsibility therefor.

In the absence of other facts, a permissible inference of appellant's odometer-tampering culpability could be drawn from the facts in this case. But, here we have an abundance of evidence negating such inference.

Before examining the inference-negating evidence, let us focus on Dale's statements to Whetmore. Dale's acceptance of

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3/ Sec. 20851 Vehicle Code reads as follows: "It is unlawful for any person to disconnect, turn back or reset the odometer of any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge."

"full responsibility" does not tell us for what he is accepting responsibility. It may have been for the actual act of disconnecting or possibly for the vehicles being in inventory with disconnected odometers. As previously indicated, the latter does not provide a basis for license discipline.

Dale's statement that the Lifetime vehicles were driven from Iowa to California with the odometers disconnected "on his orders" is also ambiguous. The statement is susceptible of several meanings: that the vehicles were driven to California on Dale's orders without his giving any thought to the odometers; that Dale ordered the vehicles knowing they would be driven to California with the odometers disconnected; or that Dale ordered that the odometers be disconnected and the vehicles driven to California. Only the latter could give rise to license discipline.

The evidence negating any inference of appellant's culpability with reference to the Lifetime vehicles is the following. Appellant had in the past regularly accepted delivery at its premises of vehicles from Lifetime with odometers disconnected (R.T. 6:19-21). Lifetime's western sales manager, Keith Haugen, testified that the odometers had "...been disconnected when they [vehicles] left the factory." This was for warranty preservation purposes. (R.T. 11:18-25.) It was Lifetime's practice to deliver all motor homes to California with

odometers disconnected (R.T. 12:19-23), according to Haugen. The disconnecting was not at the instigation of the dealers; the odometers were never connected at the factory (R.T. 12:27 to R.T. 13:9). A copy of a news letter (presented by Dale to the investigator and attached to his affidavit) from the makers of the Lifetime Motor Homes informing dealers that henceforth the makers would connect odometers at the factory was dated March 24, 1972, six days before the investigation.

Any inference of actual odometer tampering on appellant's part arising from the mere fact that vehicles were found in his inventory is effectively destroyed by the direct evidence that long before the vehicles were delivered to appellant, the odometers were either disconnected or may never have been connected at all.

The above-discussed evidence also assists us in properly interpreting appellant's ambiguous remarks to Whetmore. Because the odometer mechanism would never be hooked up at the factory and was left in that condition during delivery to the retailer to protect the warranty, pursuant to the manufacturer's policy, it does violence to rational thinking to hold that Dale accepted full responsibility for disconnecting the odometers or that he ordered the disconnections. Thus, Dale could only have meant that he accepted full responsibility for vehicles being in inventory with disconnected odometers. Further, he must have

meant either he ordered the vehicles without giving any thought to the odometers or that he ordered the vehicles without giving any thought to the odometers or that he ordered the vehicles knowing they would be driven to California with disconnected odometers. None of these is a basis for license discipline.

With reference to the Utopia Motor Homes, the only evidence produced by the department is that the two vehicles were in appellant's inventory with disconnected odometers when the investigators inspected. According to the investigator, Dale was unable to explain the disconnections. The vehicles were made locally (Westminster, California) and the investigator attested that the mileage registered at the time they were observed by the investigators "approximates" the mileage from the factory to the appellant's place of business. This, if true, would raise a permissible inference that the vehicles were driven from the factory to appellant's place of business with the odometer operating and then disconnected after they arrived. However, the evidence shows that the distance between the factory and appellant's place of business is 53 miles and, according to the department's evidence, one Utopia motor home registered 33 miles and the other registered 30 miles. Thus, all the department has proven regarding the Utopias is that two such motor homes were in appellant's inventory with

disconnected odometers and with a mileage reading less than the distance from the factory to appellant's premises.

One could possibly infer that the vehicles were driven about 30 miles from the factory and then the odometers were disconnected. But, appellant's unrefuted testimony is that the vehicles were delivered to appellant's premises by the manufacturer and were so delivered with disconnected odometers. (R.T. 6:23 to R.T. 7:2.)

The evidence preponderates to the view that appellant accepted the two Utopia Motor Homes with disconnected odometers and placed them in inventory in that condition. Doing so is not a basis for license discipline.

As we said in Tradeway Chevrolet Company, Inc. v. Department of Motor Vehicles, A-24-72, and cases cited therein:

> "We have on several occasions in the past expressed our firm position that odometer tampering is a serious matter and the malefactor should be the recipient of severe sanctions ... We are, however, equally firm in our position that sanctions should be imposed only upon the proper party. The department has not established that this appellant was that party. The evidence on the ultimate issue simply was wanting."

This language is equally applicable to the case before us.

Accordingly, and for the reasons stated, so much of the Finding of Fact IV as finds that appellant caused to be disconnected the odometers on those vehicles described as

items 2 through 8 in Exhibit A is reversed. The remaining Findings of Fact are affirmed. The Determination of Issues I, II and so much of III as relates to the Ford pickup truck are affirmed.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows.

WHEREFORE, the following order is hereby made:

The Vehicle Dealer's license, certificate and special plates (D-8944 and TR-56) heretofore issued to appellant, Ruffner's Trailers, Inc., are hereby suspended for a period of twenty-five (25) days, with twenty (20) days of the suspension stayed for a period of one year during which time appellant's license, certificate and special plates shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of the Department of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective September 24, 1973.

AUDREY B. JONES

PASCAL B. DILDAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

W. H. "HAL" McBRIDE

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-36-73

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This Final Order shall become effective _____.

Audrey B. Jones

AUDREY B. JONES

PASCAL B. DILDAY

GILBERT D. ASHCOM ✓

MELECTIO H. JACABAN

W. H. "HAL" McBRIDE ✓

ROBERT A. SMITH

WINFIELD J. TUTTLE ✓

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of the Department of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

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Gilbert D. Ashcom

GILBERT D. ASHCOM

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A-36-73

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A-36-73

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ROBERT A. SMITH

WINFIELD J. TUTTLE

Winfield J. Tuttle

A-36-73

2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

MAIN TOYOTA, INC., a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-37-73 Filed: August 9, 1973

Time and Place of Hearing: July 11, 1973, 10:00 a.m.
Room 133, Resources Building
1416 Ninth Street
Sacramento, California

For Appellant: Louis L. LaRose
Attorney at Law
104 North Stevenson Street
Visalia, CA 93277

For Respondent: R. R. Rauschert, Legal Adviser
Department of Motor Vehicles
By: Leo Bingham
Staff Counsel

FINAL ORDER

Main Toyota, Inc., hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles

following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles found that appellant had: (1) failed in 16 instances to give written notice to the department within 3 days after transfer of vehicles; (2) failed in 3 instances to mail or deliver reports of sale of used vehicles (with documents and fees) to the department within 20 days; (3) failed in 15 instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 10 days; (4) in 2 instances falsely reported the true date of sale in applications for registration; (5) filed with the department a false certificate of non-operation; (6) in 8 instances falsely reported to the department the first date of operation of vehicles; (7) in 32 instances charged purchasers of vehicles excessive registration fees; and (8) the evidence produced at the hearing left doubt that appellant in 2 instances disconnected, turned back or reset odometers, thereby finding such allegations in the accusation to be not true (Finding XI).

The director further found appellant made the following showing: (1) that it had refunded all those excess registration fees described in the findings; (2) that other violations of law committed by appellant were due in part to its failure to receive current report of sale books from the department and in part to the institution of a new accounting system in its

business after it changed its identity to a corporation; (3) it had no prior record of disciplinary action before the department; and (4) it is a large, successful Toyota new car franchise, employing approximately 50 people on a full time basis.

> For each failure to give 3-day notice, 5 days' suspension; for each used car report of sale dereliction, 5 days' suspension; for each false report of true date of sale, 15 days' suspension; for false certificate of non-operation, 30 days' suspension; for false reports of first date of operation, 30 days' suspension; for charging excessive registration fees, 30 days' suspension. It was provided that all suspensions were to run concurrently, thereby resulting in a total period of 30 days' suspension. The director further ordered that 25 days of the suspension be stayed for a period of one year, subject to the condition that appellant obey all the laws of the United States, the State of California and its political subdivisions and obey all rules and regulations of the Department of Motor Vehicles.

The main thrust of this appeal is four-fold. Specifically, appellant argues that the 3-day notice violations lack evidentiary support; that the sanctions imposed for the remaining 3-day notice violations -- which the appellant recites as 5 in number -- are not commensurate with the findings; that Finding VIII,

concerned with the false certificate of non-operation, is not supported by the evidence, and that the full penalty as provided in the decision is not commensurate with the findings.

We consider each of these arguments in order:

DOES FINDING IV AS IT RELATES TO FAILURE IN 9 INSTANCES TO GIVE WRITTEN NOTICE TO THE DEPARTMENT WITHIN THREE DAYS AFTER TRANSFER OF VEHICLES LACK EVIDENTIARY SUPPORT?

The 9 instances which appellant cites in connection with this assertion on appeal concern the dealer notices identified in Exhibit A to the accusation as numbers 1, 19, 26, 27, 28, 30, 31, 33 and 36.

To establish the allegation of failing to give the requisite 3-day notices, the department introduced the declaration of Mr. Pratt, which was received without objection. In this declaration, Mr. Pratt set forth the nature of his duties as a departmental intermediate clerk, the manner in which documents are received and filed, the fact that he prepared a summary of the data relevant to this case (Exhibit A to the accusation) and that he prepared 43 folders -- numbered to correspond with items listed on Exhibit A -- each folder containing the original or photostatic copies of documents relating to the sale and transfer of the respective vehicles. Each of numbered items cited by appellant refer to correspondingly numbered manila folders which were received in

evidence without objection. Each folder contained the dealer notices relating to the transactions alleged as violations, among which are the 9 instances here under appellate attack. The dealer notices in these sales reflect the "date first sold" and the department's stamp showing the date of receipt by the department. In each instance, including the 9 here in question, the elapsed time between the two dates exceeded 3 days.

Appellant now argues that without the testimony of the purchasers or their affidavits received in evidence, the notices of sale standing alone, in each instance, resulted in a failure of proof and constitutes reversible error.

We have been confronted with this issue before. Dispositive of appellant's argument is the view which we expressed in the matter of Pomona Valley Datsun vs. Department of Motor Vehicles, Appeal No. A-31-72, wherein we stated:

> "In our view, it is entirely proper for the department to rely on the date of sale entered by the dealer on the notice of sale and report of sale. The entry by the dealer of a certain date of sale creates a permissible inference that such date is the true date of sale. 'An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.' (Section 600(b) Evidence Code.) Is it not logical and reasonable to deduce that a licensed automobile dealer would avoid subjecting himself to both criminal and administrative sanctions (filing a false document - Section 20) by submitting to his licensor correct information on a document that the law requires? We firmly believe that such a deduction is permissible."

We adhere to the views expressed in Pomona Valley Datsun, and we fail to find in the administrative record evidence to dispel the inference that the date of sale entered by appellant was the actual date of sale. It follows, as respondent observed, that it was unnecessary for the department to call as witnesses the purchasers of the vehicles or to introduce their affidavits in evidence in order to establish the dates of sale. Accordingly, the 9 violations contained in Finding IV with which we are here concerned were sufficiently proved and the appellant's assertion of error is deemed to be without merit.

WERE THE SANCTIONS IMPOSED FOR THE REMAINING 3-DAY NOTICE VIOLATIONS COMMENSURATE WITH THE FINDINGS?

Appellant argues that after setting aside 9 instances of failure to notify within 3 days the sanctions for the remaining 5 violations are not commensurate with such findings. We cannot help but observe that appellant fails to account for 2 additional instances contained in the findings, as the violations under this accusation totaled 16 and not 14. We will concede that this miscalculation is of minor consequence.

The weakness of appellant's position here is that it is predicated on the validity and correctness of his contention in the assignment of error heretofore discussed.

Having resolved that issue adversely to the appellant, it must follow that his contention here must also fall. All 16 instances of failure to file notices within 3 days were adequately proved to support Finding IV. Consequently, at this point, we find that the sanctions imposed therefor were commensurate with the findings.

IS FINDING VIII, WHICH FINDS THAT APPELLANT FILED WITH THE DEPARTMENT A FALSE CERTIFICATE OF NON-OPERATION, SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

To properly consider this question, it is necessary to briefly summarize the pertinent evidence of record.

Finding VIII arises out of a sale of a 1960 Austin Healy by the appellant to one Larry King, who was appellant's sales manager at the time. The vehicle involved is identified as Item 41. The documents properly received in evidence consisted of: (1) a "Dealer Notice" reflecting a sale to King on "3-26-70", date stamped "Mar 30-'70", when it was received by the department; (2) a certificate of non-operation of the vehicle "as a result of storage" from "5-21-69" to "7-19-70" signed "Main Toyota, Inc. by Geri Galloway" (Miss Galloway was appellant's bookkeeper and "DMV" girl at that time); and (3) a report of sale, temporary identification, dealers book copy of the report of sale, all showing dates sold as "3-26-70" and an attached paper plate, all of which were marked "Void".

Through King's affidavit received in evidence and his testimony at the hearing, it was established that King purchased the vehicle from Main Toyota, Inc. on March 26, 1970, operated it for about 60 days and then sold it to Mike Ward. He purchased the car for about $100 and while he owned it, he "almost rebuilt it." Part of this work was done at Main Toyota, Inc. and part at his house. When he moved the car to his house, "It had the paper tag, and the paper in the windshield, report of sale." When he sold the car to Ward in April or May "or possibly in June" and asked for the papers, the vehicle had not been transferred and he was ordered to return his papers. He then took the title documents from the previous owner and gave them to Ward. King denied that he prepared the certificate of non-operation, nor did he know who did. As to the voided documents, he could not state with certainty whether they were his acts or not.

By way of defense, Miss Galloway, who signed the certificate of non-operation, testified that King probably furnished the information but could not swear to it. Mr. Salierno, president of appellant corporation, testified that he knew nothing about the certificate of non-operation but, in his opinion, it bore the handwriting of King. In January 1971, King's employment with Main Toyota was terminated at which time he had a disagreement with King over a bonus. King used profane

language, insinuated "he was a crook", and in effect, stated he was going to make trouble.

Mike Ward, on behalf of the appellant, testified that he purchased the Austin Healy from King about 30 to 45 days prior to the date he resold it, which was on September 10, 1970. However, he could not fix the date of the purchase from King with certainty nor could he state that it had not occurred in April or May without seeing his cancelled check which he did not have time to find.

Appellant now argues that King was impeached by the testimony of Mike Ward and that no evidence was produced which in any way tied Mr. Salierno, the corporation president, into the false certificate of non-operation transaction. Further, by innuendo in his argument, appellant would have us conclude that King's testimony should be disregarded as being without probative value because he was "a disgruntled ex-employee" of appellant and because his testimony was not believed at the hearing to prove the odometer violations (Finding XI).

We find no merit in appellant's contention that King was impeached by Ward's testimony. Concededly, the evidence of record establishes an apparent conflict regarding the date in 1970 when Ward purchased the Austin Healy. Either it was in April, May or possibly June, according to King, or it

was in July or August, according to Ward, who, without reference to his check, could not rule out that the purchase may have been made in April or May. Patently, from the posture of such evidence, we cannot reach a conclusion that Ward's testimony establishes that King testified falsely. The consistent fact that was established, however, regardless of whether the transaction took place in any of the months mentioned, is that Ward purchased the Austin Healy from King, who was then the owner. The crux of the violation with which we are here concerned centers not on when King sold the vehicle but on when he purchased it and the nature and extent of his operation of the vehicle thereafter. The dealer notice on file with the department established that appellant sold the vehicle to King on March 26, 1970. King testified that subsequently, with a paper tag and report of sale affixed, he moved the vehicle to his house. This evidence stands uncontradicted and establishes the falsity of the certificate of non-operation filed with the department which recites that the vehicle was in the dealer's control "as a result of storage" from "5-21-69" to "7-29-70".

As to King's hostility towards the appellant, it is only necessary to observe that this was generated in January 1971, long after the events occurred and the documentation filed

with the department which formed the basis for the violation found in Finding VIII.

We next turn to the contention that King's testimony in connection with Finding VIII should be disregarded because the hearing officer evidently did not believe his testimony in connection with Finding XI, which was concerned with two instances of odometer tampering. The department's case as to those allegations was based in part on the testimony of King. At the hearing, appellant offered evidence by way of defense. The findings of both the hearing officer and director (Finding XI) recite that the evidence produced "leaves doubt" and found the accusation "to be not true".

Absent any contrary indications, such findings do no more than determine that the evidence preponderated in favor of appellant. There is no basis whatsoever for concluding that they branded King's testimony as false. Even assuming, but without conceding, that King testified falsely as to odometer tampering, nevertheless, the balance of his testimony could be accepted if believed to be true (Witkin, California Evidence (2nd Ed.) Sec. 1125). Such may have been the case here, but we need not speculate in light of the posture of the evidence and the findings of both the hearing officer and the director with respect to the filing of the false certificate of non-operation.

With respect to appellant's contention that no evidence was presented to tie Mr. Salierno, the corporation president, to the wrongful act of filing a false certificate of non-operation, the short answer is that the decision imposes sanctions against the corporate entity and not against Mr. Salierno either as an individual or in his corporate capacity. We also view as relevant to this issue our holding in Imperial Motors vs. Department of Motor Vehicles, A-28-72, wherein we said:

> "A corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline."

For the reasons stated and having duly considered all the pertinent evidence of record, we conclude that Finding VIII is supported by the weight of the evidence.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

We answer this question in the affirmative.

In mitigation of its culpability, appellant argued, in essence, that its failure to submit timely reports resulted from the department's delay in issuing to it 1970 Report of Sale Books; that its president, Mr. S. Pete Salierno, while effecting a change of entity from a sole proprietorship to a corporation, acted in good faith at

all times under the instructions and guidance of Win Martin, a department investigator; that significant factors contributing to its problems stemmed from a heavily backlogged workload, employment of inexperienced personnel, a changeover in bookkeepers and conversion to computerized accounting; and that all overcharges were refunded.

According to his own testimony, Mr. Salierno first became a car dealer in 1960. He became a new car dealer in 1965, selling vehicles as sole proprietor of Main Auto Sales under a Toyota franchise, and continued to do business as such until he incorporated in April 1969, when he became president of Main Toyota, Inc.

It is apparent from this history of experience as a car dealer that Mr. Salierno was not a novice in the automobile business and we can safely assume that he was cognizant of the laws and regulations which required him to make timely reports of sales to the Department of Motor Vehicles. Yet in January 1970, aware that he had not received his 1970 Report of Sale Books and would not be able to comply with the reporting requirements, his corporation continued to sell and deliver new vehicles.

Although Win Martin, the department's investigator, knew of appellant's dilemma and was duly concerned, there is no evidence that he either advised Mr. Salierno to sell

new cars in January or use the 1969 Report of Sale Books in connection with these sales. To the contrary, Win Martin testified at the hearing, "You can't trip out a vehicle in 1970 on a 1969 Report of Sale Book legally." We find that Win Martin did, in fact, advise Mr. Salierno to write up his January sales in the current 1970 Report of Sale Books and that there would be a penalty. However, this advice was given after the January sales were made, after the reports were delinquent subjecting appellant to license discipline, and after the current 1970 books were obtained. Mr. Salierno had yet to initiate proper paperwork to originate title for the cars he had already sold. In these circumstances, the advice can only be construed as an effort on the part of Win Martin to help Mr. Salierno effect corrective action, and not as official condonation of his derelictions.

We have expressed our views on numerous occasions regarding the seriousness of delinquent reporting of sales to the Department of Motor Vehicles and the degree of responsibility to which a dealer must be held. (Coberly Ford v. Department of Motor Vehicles, A-25-72; Mission Pontiac v. Department of Motor Vehicles, A-6-70; and Bill Ellis, Inc. v. Department of Motor Vehicles, A-2-69.) It is clearly evident that the appellant did not meet its responsibilities and must be held to account.

Even if we found some mitigation in connection with the failure to make timely reports of the January sales, the record establishes that, subsequent to receipt of the 1970 Report of Sale Books, yet another 9 violations occurred. As the suspensions were ordered to run concurrently, these alone would tend to support the penalty imposed by the director.

We turn next to the other mitigating factors advanced by the appellant to ameliorate its position.

Appellant presented numerous witnesses to demonstrate the difficulties encountered in connection with the changeover in structure and in bookkeeping. We entertain no doubt that appellant's accounts were in a sorry state of affairs, but this was not due to the changeover in structure. According to Mr. J. M. Kimball, a certified public accountant who testified for appellant, there was no accounting problem and there was very little "work involved in changing the entity from Main Auto to Main Toyota, Inc." Although changing to computerization presented difficulties, there were a lot of other problems. Neither inventories nor accounts payable could be reconciled. "...several hundred thousand dollars of liabilities and notes, we had lost -- they had control of the amounts due and dates of payment due -- had been lost." As Miss Gonzales, appellant's bookkeeper summed it up, "The entire records of the corporation were very far behind. The accounts were not

balanced and the work was no up-to-date ... the books were in a terrible mess ... it took all of 1970 and part of '71 to get the asset and liability accounts balanced."

It is clear that appellant's problems were of long-standing duration and not the result of a changeover in entity. Lack of competent personnel certainly was a contributing factor, but it only served to increase the need for maximum supervision and control by management. In this, appellant failed and cannot now be absolved from the results of its own shortcomings.

With respect to overcharges, these apparently came to light during the investigation of appellant sometime in early 1971. Under instructions from Mr. Kimball, Miss Gonzales either made refunds or credited the customers' accounts. Refunds were given a low priority because of the pressure of other work and they were made by Miss Gonzales "quite a bit later ... when its time came." The overcharges were maintained in a separate account as an accrued liability which was reflected on the monthly financial statement. The accusation in this case was filed on March 10, 1972, predicated on overcharges made in 1970. Refunds were not completed until May 1972.

We find no mitigation in the fact that all overcharges were refunded or credited and reiterate our views expressed in Pomona Valley Datsun, supra:

"...having violated the law by overcharging the customer, the licensee has absolutely no right to continue to use the overcharged amount in its business on the assumption the customer may return to the licensee for services or goods to offset the debt. The licensee must, upon discovering its erroneous overcharge, take immediate steps to refund the money it unlawfully extracted from its customers if it hopes to show mitigation in regard to penalty.... Appellant's showing in this regard is lacking."

One final matter raised by the appellant merits brief comment. Appellant argues that in Midway Ford Sales v. Department of Motor Vehicles, A-11-70, we stayed a 10-day suspension for similar violation which in its view was more aggravated in nature and number. Although we did stay a 10-day suspension, appellant overlooks the fact that our final order affirmed the director's decision which provided for a 30-day suspension with two years' probation, modifying only that portion which stayed the suspension for 20 days.

While we are ever mindful of the importance of consistency in imposing license discipline, suffice it to say that, in determining appropriate penalties, each case must be decided on its own merits, considering all the facts and circumstances and matters in mitigation. We have carefully and fully considered the entire record in this case and, as previously noted, have determined that the penalty imposed herein is commensurate with the findings.

The Decision of the Director of Motor Vehicles is hereby affirmed in its entirety.

This Final Order shall become effective _____.

Gilbert D. Ashcom

GILBERT D. ASHCOM

AUDREY B. JONES

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

MELECIO H. JACABAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

The Decision of the Director of Motor Vehicles is hereby affirmed in its entirety.

This Final Order shall become effective _____.

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WINFIELD J. TUTTLE

The Decision of the Director of Motor Vehicles is hereby affirmed in its entirety.

This Final Order shall become effective August 20, 1973.

GILBERT D. ASHCOM	AUDREY B. JONES
PASCAL B. DILDAY	W. H. "HAL" McBRIDE
MELECIO H. JACABAN	ROBERT A. SMITH

WINFIELD J. TUTTLE

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

MAIN TOYOTA, INC., a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-37-73 Filed: August 9, 1973

Time and Place of Hearing: July 11, 1973, 10:00 a.m.
Room 133, Resources Building
1416 Ninth Street
Sacramento, California

For Appellant: Louis L. LaRose
Attorney at Law
104 North Stevenson Street
Visalia, CA 93277

For Respondent: R. R. Rauschert, Legal Adviser
Department of Motor Vehicles
By: Leo Bingham
Staff Counsel

CORRECTION OF FINAL ORDER

Please substitute the attached Page 3 for the present Page 3 in the above-entitled matter.

On 8/10/73 sent this correction to the parties, Director Cozens, RRRauschert, Elwyn, Jake — all other copies were corrected before being mailed out. JL

business after it changed its identity to a corporation; (3) it had no prior record of disciplinary action before the department; and (4) it is a large, successful Toyota new car franchise, employing approximately 50 people on a full time basis.

The penalty imposed by the director was as follows:

> For each failure to give 3-day notice, 5 days' suspension; for each used car report of sale dereliction, 5 days' suspension; for each false report of true date of sale, 15 days' suspension; for false certificate of non-operation, 30 days' suspension; for false reports of first date of operation, 30 days' suspension; for charging excessive registration fees, 30 days' suspension. It was provided that all suspensions were to run concurrently, thereby resulting in a total period of 30 days' suspension. The director further ordered that 25 days of the suspension be stayed for a period of one year, subject to the condition that appellant obey all the laws of the United States, the State of California and its political subdivisions and obey all rules and regulations of the Department of Motor Vehicles.

The main thrust of this appeal is four-fold. Specifically, appellant argues that the 3-day notice violations lack evidentiary support; that the sanctions imposed for the remaining 3-day notice violations -- which the appellant recites as 5 in number -- are not commensurate with the findings; that Finding VIII,

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of STOCKTON DODGE, INC., A Deleware Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-38-73 Filed: September 5, 1973

Time and Place of Hearing:	August 8, 1973, 10:00 a.m. Auditorium, DMV 2570 - 24th Street Sacramento, CA 95818
For Appellant:	Kenneth Ferguson Attorney at Law Ferguson, Dedekam & Barrows 225 East Channel Street Stockton, CA 95202
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Henry J. Ahler Legal Counsel

FINAL ORDER

The appropriateness of the penalty imposed by the Director of Motor Vehicles is the only issue this appeal presents for

our consideration.

Proceeding via the Administrative Procedure Act (Section 11500 et seq. Government Code), the director found that Stockton Dodge, Inc., hereinafter referred to as "appellant", had: (1) failed in 7 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 82 instances to mail or deliver reports of sale (with documents and fees) to the department within 20 days; (3) failed in 6 instances to mail or deliver reports of sale (with documents and fees) to the department within 30 days; and (4) in 28 instances, charged purchasers of vehicles excessive registration fees.

The director imposed a penalty of 10 days' suspension, with 9 days stayed for a one year probation period on condition that appellant obey all laws of the United States, the State of California and its political subdivisions and obey all rules and regulations of the Department of Motor Vehicles.

Appellant does not dispute the findings of the director but bases his appeal solely on the grounds that the penalty is not commensurate with the findings, suggesting that probation alone would be more than adequate.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

The operative facts presented by the appellant at the

administrative hearing, and which formed the basis for his brief and argument on appeal, is, in essence, as follows:

The current president of appellant, Mr. Byington, took ownership of the corporation on January 1, 1971. One of the employees he retained at that time was the girl assigned to do Department of Motor Vehicles work. The girl proved inefficient and her employment was terminated in May 1971. Subsequently, during the next five months two other girls were employed but had to be replaced as they proved unsatisfactory. The girls he replaced, working with the old "bundle" forms, either overlooked or ignored overcharges. He also had to replace his office manager who was incompetent. On October 1971 he employed a Mrs. Forment who is still employed and who instituted procedures to insure that refunds are made immediately upon identification and on almost a daily basis. Disagreements over the proper computation of fees were encountered with the Department of Motor Vehicles resulting in numerous resubmissions. Penalties for being late were paid. In several instances, reports of sale were not returned by the department for correction until it was too late to comply with timely reporting requirements. Refunds have been made; the violations were the result of "honest mistake" with no intent to defraud; and Mr. Byington understands that appellant corporation was responsible for the

acts of its employees.

No useful purpose would be served to set forth all of the department's evidence as the Findings of Fact are not in dispute. However, of importance is evidence introduced by the department in the form of a letter dated April 15, 1971. This letter advised appellant that the department had become cognizant of 18 infractions which occurred during the period November 23, 1970, to April 12, 1971. The letter suggested that corrective measures be taken and advised that another review would be made in the near future.

The crux of the problem now is whether the mitigation presented by the appellant is sufficient to move this board to modify the penalty as imposed by the director.

While the evidence in mitigation is strong, it is significantly offset by the department's letter of April 15, 1971. Recognizing that appellant only took over the corporation on January 1, 1971, nevertheless, approximately three months thereafter he was put on notice that violations had been occurring, was advised to take corrective measures and that there would be another review. In these circumstances, it was incumbent on appellant to act with the highest degree of concern to assure compliance with the requirements of the Vehicle Code. Examination of department's Exhibit A to the accusation reveals that

approximately 105 of the 112 transactions from which the violations were generated occurred after April 15, with most occurring during the last six months of the year. Appellant had sufficient warning and time to set its house in order, at least for the latter part of the year.

In our view, the degree of "scrupulous" and "responsible" conduct required of dealers was not met by the appellant (cf. Diener Motors vs. Department of Motor Vehicles, A-15-71; Pomona Valley Datsun vs. Department of Motor Vehicles, A-31-72). Accordingly, we find the penalty imposed by the director to be entirely fair and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective September 21, 1973.

PASCAL B. DILDAY JOHN ONESIAN

GILBERT D. ASHCOM WINFIELD J. TUTTLE

MELECIO H. JACABAN

DISSENT

We dissent in part. While we affirm the Decision of the Director of Motor Vehicles imposing a penalty of 10 days' suspension with a period of one years' probation, we would stay the suspension in its entirety.

A-38-73

W. H. "HAL" McBRIDE ROBERT A. SMITH

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of BISHOP-HANSEL FORD SALES, INC., dba BISHOP-HANSEL FORD, A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-39-73 Filed: September 5, 1973

Time and Place of Hearing:	August 8, 1973, 1:30 p.m. Auditorium, DMV 2570 - 24th Street Sacramento, CA 95818
For Appellant:	Allen M. Garfield Attorney at Law 55 Ninth Street San Francisco, CA 94103
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Karl Engeman Legal Counsel

FINAL ORDER

The appropriateness of the penalty imposed by the Director of Motor Vehicles is the only issue this appeal presents for our consideration.

Proceeding via the Administrative Procedure Act (Sec. 11500 et seq. Government Code), the director found that Bishop-Hansel Ford Sales, Inc., doing business as Bishop-Hansel Ford, hereinafter referred to as "appellant" had: (1) in 14 instances charged purchasers of vehicles excessive registration fees; and (2) appellant employed or delegated the duties of salesman to four individuals who had not been licensed as such and whose licenses were not displayed on appellant's premises.

The director imposed a penalty of three days' suspension for each violation. The suspensions were ordered to run concurrently but were stayed in their entirety for a period of one year, subject to the condition that appellant obey all the laws of the United States, the State of California and its political subdivisions and obey all the rules and regulations of the Department of Motor Vehicles.

Appellant now requests us to completely reverse the penalty imposed by the director and substitute therefor a "Letter of Admonition". Appellant contends that the punishment imposed is harsh, arbitrary and much too severe, as the violations found were not wilful, but were due to oversight and ignorance. Appellant further contends that the probation is onerous as it would subject him to a 3-day suspension for any further violation during the period of

probation, even though such violation was unintentional.

Having duly considered the administrative record and appellant's brief and argument before this board on appeal, we are satisfied and in agreement with appellant that the violations involved in this case were not wilfuly committed. However mitigating this factor may be, it does not excuse the violations. Wilfulness or state of mind are not elements which need be considered in determining whether there was or was not a violation of Section 11713(g) Vehicle Code (Diener Motors vs. Department of Motor Vehicles, A-15-71).

We are not confronted here with an individual new in the automobile business. Appellant's president and general manager has been a dealer for over 25 years, at least 14 of which have been in the State of California. Consequently, we cannot attach the same degree of mitigation to this case as we might otherwise do. Negligence, oversight and ignorance only point up the measure of responsibility which was lacking in the appellant in discharging its obligations to the public in compliance with the requirements of the Vehicle Code. We do not view these factors as providing any basis for condonation of the violations or for exoneration of the appellant.

Addressing the matter of the negligence of employees, our holding in Imperial Motors v. Department of Motor Vehicles,

A-28-72, is dispositive of this issue:

> "A corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline."

In conclusion, our observations in Diener Motors, Inc. vs. Department of Motor Vehicles supra are equally applicable to the case at hand:

> "The penalty permits the appellant to continue its business of selling motor vehicles. The conditions of probation merely require that appellant do that which all vehicle dealers are obligated to do; i. e., obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing the exercise of the privileges as a licensee. Should appellant do so, the ... stayed suspension is of no consequence. Should it not do so, the Director of Motor Vehicles may remove the stay or a portion thereof after giving appellant notice and opportunity to be heard."

We find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective September 21, 1973.

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of WORTHINGTON MOTORS, dba WORTHINGTON DODGE, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-40-73 FILED: January 25, 1974

Time and Place of Hearing:	January 9, 1974, 10:30 a.m. City Council Chambers City Hall 1685 Main Street Santa Monica, CA 90401
For the Appellant:	Louis Gotenstein and Marvin Gross Attorneys at Law Grayson & Gross, Inc. 3460 Wilshire Blvd., Suite 810 Los Angeles, California
For the Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER

Worthington Motors, a California corporation, doing business as Worthington Dodge, hereinafter referred to as "appellant",

appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that appellant had: (1) failed in 103 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 484 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days; (3) failed in 177 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 30 days.

In addition, the following facts in mitigation and aggravation were found: (1) The acts and omissions chargeable to appellant resulted in part from a chaotic condition of the record-keeping of appellant brought about by a deliberate course of conduct by appellant's then business and office manager, including embezzlement, designed to benefit said individual and to injure appellant-employer.[1/] (2) While substantial efforts were undertaken by appellant to correct said situation, when discovered by appellant, the efforts were not adequate to the task and correction of the faulty practices, though finally effected,

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1/ During oral argument, counsel for the respondent suggested that the board consider reversing this finding. As this finding was adopted by the Director of Motor Vehicles in his decision, counsel's actions in proferring this suggestion is deemed to have been wholly improper.

was not effected with due diligence and dispatch. (3) Appellant's retail sales averaged 375 to 400 vehicles per month. (4) In 1960, appellant's license was suspended for 180 days with 175 days stayed for similar conduct as in the present case, plus additional fraudulent acts.

The director, adopting the proposed decision of the hearing officer, suspended appellant's dealer license, certificate and special plates for a period of five (5) days.

During oral argument, counsel for the appellant stated that the only issue raised by this appeal was that of the propriety of the penalty imposed, all issues of fact being admitted. Nonetheless, we have reviewed the evidence, resolved conflicts therein, drawn such inferences as we believe reasonable and have arrived at our own determination regarding credibility of witnesses in the transcript of the administrative proceedings. (Section 3054, subsection (d), Vehicle Code; Park Motors, Inc. vs. Department of Motor Vehicles, A-27-72, citing Holiday Ford vs. Department of Motor Vehicles, A-1-69.) Further, we have considered the legal arguments propounded by appellant in his brief and find them to be without merit.

Having independently weighed all of the evidence in light of the whole record, we determine that all of the findings, as found by the director, are supported by the evidence. We further find that the department has not exceeded its juris-

diction nor has it proceeded in a manner contrary to law. Accordingly, all of the findings of fact and determination of issues relating thereto are affirmed.

Having carefully and fully considered and weighed all of the matters established by the appellant in mitigation and extenuation in this case, we find the penalty to be entirely commensurate with the findings. In reaching this determination, we have considered the previous license disciplinary action taken by the department against this appellant, with full cognizance that the resultant penalty was imposed in 1960.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective February 22, 1974.

THOMAS KALLAY

PASCAL B. DILDAY

GILBERT D. ASHCOM

ROBERT A. SMITH

WINFIELD J. TUTTLE

D I S S E N T

I dissent in part. Having duly considered the matters in mitigation in light of the nature of the violations, I do not consider the actual imposition at this time of a five (5) day suspension to be appropriate. I would approve the five (5) day

suspension, but stay the execution thereof and place the appellant on probation for a period of two (2) years on the usual terms and conditions.

W. H. "HAL" McBRIDE

A-40-73

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P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of ROBERT EUGENE SYKES, dba FAMILY FUN-MOBILIVEN, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-41-73 Filed: November 1, 1973

Time and Place of Hearing:	September 12, 1973, 10:30 a.m. State Building, Room 1157 350 McAllister Street San Francisco, California
For Appellant:	Robert L. Mezzetti Mezzetti and Testa Attorneys at Law 300 South First, St., Suite 210 San Jose, CA 95113
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Leo V. Bingham Staff Counsel

FINAL ORDER

Robert Eugene Sykes, dba Family Fun Mobiliven, hereinafter referred to as "appellant" appealed to this board from a decision of the Director of Motor Vehicles in Case No. RD-73,

entitled "In the Matter of the Statement of Issues Against Robert Eugene Sykes, dba Family Fun Mobiliven". In this decision, the director adopted the proposed decision of the hearing officer and denied appellant's application to be licensed as a new car dealer on the following findings:

A. From about March 26, 1968, to about February 21, 1970, appellant was an officer of Bay Area Auto Auction, Inc., a California corporation with dealer's license and special plates (D-8565). While engaged in said business, appellant submitted 61 checks to the department for fees due the State, which checks were dishonored or payment was refused on presentation.

B. From about September 14, 1966, to about February 14, 1969, appellant was doing business in California as Motorama Liquidators with dealer's license and special plates (D-574). While operating said business:

   (1) Appellant in 3 instances failed to give written notice to the department within 3 days after transfer of vehicles.

   (2) Appellant in 7 instances failed to mail or deliver reports of sale (with documents and fees) to the department within 20 days.

C. From about December 21, 1962, to about December 4, 1969, appellant was an officer of Sy-Be, Inc., doing business in California as Bob Sykes Dodge, with dealer's license

and special plates (D-3558). While engaged in such business:

(1) Appellant in 4 instances failed to give written notice to the department within 3 days after transfer of vehicles.

(2) Appellant in 7 instances failed to mail or deliver reports of sale (with documents and fees) to the department within 20 days.

(3) Appellant in one instance falsely reported true date of sale in applications for registration.

(4) Appellant in 6 instances charged purchasers of vehicles excessive registration fees.

D. From about November 1, 1968, to about May 20, 1969, appellant was an officer of Imelda Corporation, Inc., doing business in California as World Imports under dealer's license and special plates (D-4537). While engaged in said business:

(1) Appellant in 17 instances failed to give written notice to the department within 3 days after transfer of vehicles.

(2) Appellant in 24 instances failed to mail or deliver reports of sale (with documents and fees) to the department within 20 days.

(3) Appellant in 2 instances falsely reported true date of sale in applications for registration.

(4) Appellant in one instance filed with the department a false certificate of non-operation.

(5) Appellant in 5 instances charged purchasers of vehicles excessive registration fees.

(6) Appellant submitted 6 checks to the department for fees due the State, which checks were dishonored or refused payment on presentation.

The proposed decision also contained special findings which were adopted by the director as follows:

1. Respondent [appellant] is approximately 46 or 47 years of age, is married and has three children. Prior to becoming licensed by the department as heretofore set forth, his only known occupation was that of a professional football player.

2. Although legally responsible, as a licensee, for that conduct previously set forth in the Second through the Fifth Cause of Action herein, it was not established that respondent was personally involved in each of said activities.

3. In April of 1972 the department issued an unrestricted motor vehicle salesman's license to respondent [appellant]. Such was issued without objection and respondent [appellant] has incurred no known violations of law thereunder.

4. Since the time of the issuance of the above license to the date of the present hearing (January 23, 1973), respondent's [appellant's] services have been retained by a dealership in Santa Clara, California. This business deals primarily with recreational vehicles, both new and used.

5. In such capacity respondent [appellant] acts as, and has all the authority of, a general manager.

Section 3054, subsection (d), requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72, citing Holiday Ford v. Department of Motor Vehicles, A-1-69, and Weber and Cooper v. Department of Motor Vehicles, A-20-71.)

Having weighed all the evidence in the light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. Accordingly, all of the Findings of Fact and Determination of Issues relating thereto are affirmed.

In view of our determination herein, we find it appropriate to comment only briefly on the matters stated to be the basis

of appeal in appellant's opening brief. Appellant contends that the evidence does not support the findings in four specific areas: First, it is contended that the appellant was not personally in charge of reporting sales; that this was the responsibility of others; and that personnel handling this aspect of the business were inexperienced. This board has consistently held that "a corporate licensee is responsible for all the acts of officers, agents and employees acting in the course and scope of their employment. A contrary view would, of course, preclude meaningful license discipline". (Main Toyota, Inc., v. Department of Motor Vehicles, A-37-73; Imperial Motors v. Department of Motor Vehicles, A-28-72.) The same results would obtain in a partnership.

As to employment of inexperienced personnel, we have heretofore considered this as mitigation and not a matter of defense and we have thus considered such evidence in the case before us. (Diener Motors v. Department of Motor Vehicles, A-15-71; Main Toyota v. Department of Motor Vehicles, A-37-73.)

Secondly, it is contended that the checks issued by Bay Area Auto Auction, Inc., were dishonored because Barclay's Bank closed out appellant's account without his knowledge or consent and while sufficient funds were on deposit. Further, full restitution was made.

Section 11705 Vehicle Code proscribes as a violation the following conduct where a licensee "has submitted check...to the department...and it is thereafter dishonored or refused payment upon presentation."

The reason why Barclay's Bank closed appellant's account is highly speculative as the evidence does not establish that the bank's action in doing so was wrongful or without just cause. The hearing officer found against the appellant as to these checks and having exercised our independent judgment in evaluating the evidence, we conclude that the findings are supported by the evidence.

The third contention is that it was nearly impossible to determine exact registration fees; that customers were advised to ask for refunds if overcharged; and that all refunds were made.

We view appellant's claim of inability to determine exact registration fees to be without merit. The fact that refunds were made is a matter in mitigation but not of defense. As to the advice to customers to claim refunds, we adhere to our past holdings that the duty to make refunds rests with the dealer and the onus is not on the customer to obtain a refund of an overcharge. (Main Toyota, Inc. v. DMV supra; Pomona Valley Datsun v. DMV, A-31-72.)

Lastly, it is contended that three checks issued by Imelda Corporation, Inc., were returned by the Bank of America

without the knowledge or consent of the appellant (Finding in Para. D(6) supra). As to these three checks, appellant explained that the money's on deposit were used to offset appellant's indebtedness. Again, we are left to speculate as to evidence of wrongdoing or unjustifiable actions by the Bank of America. Of significance is the fact that this same finding includes three other checks issued by appellant but drawn on the Crocker-Citizens Bank in the sum total of $1,586.00, which were dishonored and refused payment when presented by the department. Neither the evidence of record nor any matter raised by this appeal touches upon the reason for their return. The hearing officer determined the issue here adversely to the appellant and in our independent evaluation of the evidence, we conclude that the evidence supports the findings in their entirety.

An issue alluded to in appellant's opening brief, but argued vigorously at the hearing before this board, requires discussion. The issue, as stated, is that appellant has been denied due process. This is predicated on the allegation that with respect to the adoption of the hearing officer's proposed decision, the director relied on the review and recommendation of the staff counsel who prosecuted the case at the administrative hearing and, thereby, relinquished his duty to independently decide the case upon the record.

In his argument, appellant capsulized the facts and circumstances underlying the present appeal which contains reference to a previous case in which the department refused him a vehicle dealers license, Case RD-56. Since the appeal in that case was dismissed by this board on the basis of lack of jurisdiction (In the Matter of Sykes, dba Family Fun Mobiliven, A-21-72) under normal circumstances, we would not consider it at this time. However, the case is so intertwined with the present appeal and the assertion of lack of due process that it cannot properly be disregarded.

On or about July 30, 1970, appellant filed an application for a vehicle dealer's license which was refused by the department. In 1971, pursuant to the Vehicle Code, appellant was granted a hearing on a Statement of Issues identical to those in the instant case and the hearing officer made findings which were also identical to those now before us (Case RD-56). The proposed decision recommended the issuance of a 2-year probationary license, stating, "It would not be against the public interest to issue a probationary vehicle dealer's license to the respondent [appellant]." The director did not adopt this proposed decision but promulgated his own decision denying the license. This board as indicated supra dismissed the appeal from that decision as the case did not involve a new car dealer.

Subsequently, in 1972, appellant applied for a license as a new car dealer which was also refused. Appellant requested a hearing on a Statement of Issues and a second hearing officer made Findings of Fact and Determination of Issues identical to those in RD-56 with special findings (all as set forth supra) but recommended that the license be denied (Case RD-73). The director adopted that decision and it is the appeal therefrom that is now before us.

To make out its case in RD-73, the department introduced the record of transcript in RD-56 together with all accompanying documentation. Thus, we have before us for examination all of the information developed in both hearings. While the case RD-56 is not before us for review, we deem it relevant in determining the issue of whether the appellant was denied due process in the present case. The significant factors which tie both cases together are the sameness of the Statement of Issues, Findings of Fact and Determination of Issues and the fact that the same department staff counsel prosecuted both cases.

No evidence was presented by appellant in support of his argument, however, it was conceded by staff counsel, in both written and oral argument, that it was he who prepared the proposed decisions for the director. It is this action which appellant brands as improper. Appellant argues that it is a denial of due process when the prosecuting staff counsel considers the proposed decision and prepares the director's

decision, which, for all practical effect, is his recommendation as to what action should be taken by the director.

Appellant further urges, also without evidentiary support, that the director, acting solely on the representations and recommendations of the prosecuting staff counsel and without the record before him, thus, divested himself of his legal duty to independently review the record and render a decision.

We turn our attention first to Case No. RD-56 wherein the proposed decision was not adopted by the director and proceedings were had under Section 11517(c) of the Government Code. We find of record a "Notice Concerning Proposed Decision" filed November 21, 1971, advising appellant that the proposed decision was not adopted and that the department would itself decide the case. Appellant, therein was advised of his right to submit written or oral argument and was furnished the order contained in the proposed decision and the transcript of proceedings had before the hearing officer. We further find in the decision subsequently filed December 18, 1971, the recitation that the respondent [appellant] did submit written argument and that the decision was rendered after consideration of "the entire record, including the transcript and the written argument of respondent [appellant]."

The reply brief in the instant appeal admits that the department's director of compliance and staff counsel

recommended to the director that the proposed decision not be adopted. (Res. Reply Br. 2:23-25.) But, it goes on to recite that a transcript of the hearing was ordered by the director who, after its receipt, decided the case himself (Res. Reply Br. 2:26-27) and that the director advised staff counsel of his desire to deny the application and ordered that he draft the decision for his consideration and signature (Res. Reply Br. 30:2-4.)

Considering all of the circumstances and the evidence of record and considering Case No. RD-56 only as it bears on the present appeal, we are satisfied that the director acted in accordance with the procedures prescribed in Section 11517(c) of the Government Code and that he exercised his independent judgment in rendering the decision in that case.

We next focus out attention to the present appeal and Case No. RD-73 upon which it is predicated. Here, although appellant's arguments are essentially the same as previously indicated, it was emphasized in oral argument before the board that the record of transcript was not available to the director at the time of his decision.[1/]

1/ The reporter certified the record of transcript June 15, 1973; the director's decision is dated April 2, 1973.

Examination of Section 11517(b) Government Code contains no language requiring the director to decide the case on the record when he adopts the proposed decision of the hearing officer. (Contra: Where the director does not adopt the proposed decision and he decides the case himself -- Section 11517(c) Government Code.)

It has been held that it is not a denial of due process of law where an agency adopts the proposed decision of a hearing officer without reviewing the record. (Stouneb v. Munro, 219 Cal.App.2d 302; Hohreiter v. Garrison, 81 Cal.App.2d 384, 396.) A recommended decision containing findings and conclusions may form a sufficient synopsis, at least when the statute authorizes the agency to delegate the hearing to a hearing examiner and "base its decision or award upon the report" of the examiner. (Taylor v. IAC (1940) 38 Cal.App.2d 75, 82. See also Bertch v. Social Welfare Dept. (1955) 45 Cal.2d 524, 529.) This procedure does not violate due process. (Hohreiter v. Garrison, supra.)

In the instant situation, Case No. RD-73, the director adopted the proposed decision of the hearing officer, thus, obviating the necessity that he have before him the record of transcript. (See also Davis Admin. Law Treatise, Vol. 2, §11.04.) However, we need not rest solely on this position because of the unusual manner in which the department

presented its case in RD-73. This was accomplished as previously indicated by introducing in evidence the entire transcript and documentation in Case RD-56 which the director had already considered in its entirety and which was available to him. The only other evidence presented during the hearing of Case No. RD-73 was some additional testimony by the appellant. This testimony was fully summarized by the hearing officer in his proposed decision. Consequently, even though the official record of transcript was not available for review by the director, for all intents and purposes, he did have the entire record upon which to render his decision and we are satisfied that he rendered his decision independently and in accordance with the provisions of Section 11517(b) of the Government Code.

In reaching this conclusion, we are buttressed by the presumption of regularity of administrative action. "The presumption of regularity supports the official acts of public officers and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (U.S. v. Chemical Foundation, 272 U.S. 1, 14-15, 47 S.Ct. 1.)

Although we take cognizance of the fact that the prosecuting staff counsel did prepare the decision for the director, in the circumstances which we have to consider, this amounted to no more than his recommendation regarding the decision. In the

absence of a showing of specific prejudice, we will not speculate error.

We feel it incumbent at this point to make one final observation. The Federal Administrative Procedure Act prohibits an employee or agent engaged in the performance of investigative or prosecuting functions in a case, or a factually related case, to participate or advise in the decision, recommended decision or agency review. This is discussed in Davis Administrative Law Treatise, Vol. 2, Sec. 13:05 at page 20, as "internal separation"; that is, the protection within the agency of the judging function, so that it will not become contaminated through the influence of those who are prosecuting or investigating. Some similar separation of functions if incorporated into the department's practice would avoid the "appearance of evil", which under circumstances different from the instant case, might lead us to a different result than that reached herein.

In light of the foregoing and for the reasons stated and having exercised our independent judgment, we find that the appellant has not been denied due process of law.

The decision of the Director of Motor Vehicles in Case No. RD-73 is affirmed.

This Final Order shall become effective when served upon the parties.

PASCAL B. DILDAY

AUDREY B. JONES

MELECIO H. JACABAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

D I S S E N T

I dissent. Appellant has been licensed as a salesman and has successfully demonstrated his ability and capability to discharge the full responsibilities of a general manager of a new car dealership. I would agree with the findings of the hearing officer in Case RD-56 that it would not be against the public interest to issue a probationary vehicle dealers license to the appellant.

I see no justification at this time to adhere to a position which will continue to deprive the appellant of the opportunity to be licensed as a new car dealer. I would direct the department to exercise its authority and power to grant appellant's license.

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P. O. Box 1828
2415 First Avenue
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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of BILL BARRY PONTIAC, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-42-73 FILED: December 11, 1973

Time and Place of Hearing:	November 14, 1973, 10:30 a.m. Board Room, Port of Long Beach Administration Building 925 Harbor Plaza Long Beach, CA
For Appellant:	Frank C. Aldrich Attorney at Law 100 Oceangate, Suite 1010 Long Beach, CA 90802
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER

Bill Barry Pontiac, Inc., dba Bill Barry Pontiac, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings

pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that appellant had: (1) failed in 79 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 176 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days; (3) failed in three instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 30 days; (4) in four instances charged purchasers of vehicles excessive registration fees; (5) in one instance falsely advertised a vehicle as having power brakes when, in fact, the vehicle was not so equipped; further, the vehicle had been sold four days previous to the particular advertisement alleged; (6) in two instances advertised vehicles for sale when in fact they had been previously sold, one three days before and one four days before; and (7) in seven instances charged a $15 Documentary Fee without including such fee in the cash price of the vehicles.

The director, adopting the proposed decision of the hearing officer, imposed suspension penalties as follows: for late notices of sale, 5 days' suspension; for late reports of sale not filed within 20 days, 10 days' suspension; for late reports of sale not filed within 30 days, 15 days' suspension; for

charging excessive registration fees, 5 days' suspension; for false advertising of a sold vehicle, 5 days' suspension; for advertising two sold vehicles, 5 days' suspension; for failure to include "Documentary Fees" in the cash price, 10 days' suspension. The penalty provides for all suspensions to run concurrently for a total of 15 days' suspension with 10 days stayed for a probationary period of one year on the usual terms and conditions.

Section 3054, subsection (d) requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings. (Park Motors, Inc. vs. Department of Motor Vehicles, A-27-72; citing Holiday Ford vs. Department of Motor Vehicles, A-1-69; and Weber and Cooper vs. Department of Motor Vehicles, A-20-71.)

Having weighed all the evidence in the light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. We find that the department has not proceeded without or in excess of its jurisdiction nor has it proceeded in a manner contrary to the law. Accordingly, all of the Findings of Fact and Determination of Issues relating thereto are affirmed.

As one of the issues on appeal, appellant, citing Ralph Williams Ford vs. New Car Dealers Policy and Appeals Board (106 Cal.Rptr. 340), contends that the language in Section 4456.5 Vehicle Code limits the penalty to a $3 forfeiture for failure to file notices and reports of sale within the time prescribed. Thus, appellant continues, license disciplinary action as punishment for failure to make timely reports has been eliminated and the accusation is therefore insufficient to support such action.

The language quoted by the appellant is as follows:

> "Notwithstanding any other provision of this code, the three dollar ($3) forfeiture payment provided by this section shall constitute the sole cause of action arising from non-compliance with paragraphs (3) and (4) of subdivision (c) of Section 4456 by the dealer."

The question raised is not one of novel impression as this board recently commented on almost this very same issue in its final order in Suburban Ford, Inc. vs. Department of Motor Vehicles, Appeal No. A-35-73. There, after referring to our holding in Coberly Ford vs. Department of Motor Vehicles, A-25-72, in which we reviewed the legislative history requiring timely and accurate reporting and citing Evilsizor vs. Department of Motor Vehicles (1967), 25 Cal.App.2d 216, we stated:

> "As we read sections 4456 and 4456.5, the language is certain and unambiguous that the basic intent is to give the dealer a 20-day period in which to collect and submit

> to the department the various documents needed to register or transfer title along with the fees and penalties, if any, that are required for licensing and registration. If the dealer needs additional time, Section 4456.5(a) provides that he 'shall, upon payment of a forfeiture fee of three dollars ($3) to the department, be allowed an additional 10 days to present to the department an application and documents in acceptable form'. (Underscoring supplied.) Paragraph (b) of Section 4456.5 then goes on to state that following payment of the three dollar ($3) forfeiture fee and upon a showing of diligent effort within such 30 days to obtain requisite information or documents to enable transfer, the dealer shall be allowed an additional 10 days to file, thus extending his total filing time to 40 days.
>
> "It is clear, when read in context, that the payment of the three dollar ($3) forfeiture fee, provided for in subparagraph (a), is a condition precedent to obtaining the 10-day extension to the basic 20-day filing period."

In the instant case, the three dollar ($3) forfeiture payment provided by this section was never paid in any instance with the exception of three items to the accusation. In those three sales, reports were not filed within 40 days and none were made the subject of a violation of Section 5901 Vehicle Code (i.e., failing to file a notice within three days) thereby obviating any concern with Section 4456(c)(3) Vehicle Code.

While the factual posture in the Suburban Ford case raised the question in terms of timeliness of payment of the $3 forfeiture, nevertheless, the essence of our position was a rejection of any interpretation of 4456.5 Vehicle Code which would preclude further license disciplinary action, when appropriate under the code. We adhere to our previous

holding and attach no merit to appellant's contention that the only penalty which may be imposed for failure to file timely notices and reports of sale is a three dollar ($3) forfeiture payment.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation in this case, we are disposed to reduce the penalty imposed by the decision of the director.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the Decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The Vehicle Dealer's license, certificate and special plates (D-2600) heretofore issued to appellant, Bill Barry Pontiac, Inc., a California corporation, are suspended for the following periods:

1. For the violations set forth in Finding III, five (5) days.

2. For the violations set forth in Finding IV, ten (10) days.

3. For the violations set forth in Finding V, fifteen (15) days.

4. For the violations set forth in Finding VI, five (5) days.

5. For the violation set forth in Finding VII, five (5) days.

6. For the violations set forth in Finding VIII, five (5) days.

7. For the violations set forth in Finding IX, ten (10) days.

All the aforementioned periods of suspension to run concurrently, for a total period of suspension of fifteen (15) days; provided, however, that twelve days of said fifteen-day period of suspension is stayed for a period of one year from the effective date of this final order, during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant

due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective January 3, 1974.

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

JOHN ONESIAN

WINFIELD J. TUTTLE

A-42-73

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This Final Order shall become effective _____.

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Audrey B Jones

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A-42-73

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This Final Order shall become effective _____.

Gilbert D. Ashcom

GILBERT D. ASHCOM

MELECIO H. JACABAN

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A-42-73

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A-42-73

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This Final Order shall become effective _____.

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

JOHN ONESIAN

WINFIELD J. TUTTLE

Winfield J. Tuttle

A-42-73

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

UNDERWOOD FORD MERCURY, INC., dba UNDERWOOD FORD MERCURY, An Oregon corporation, Appellant,	Appeal No. A-43-73
vs.	FILED: April 3, 1974
DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	

Time and Place of Hearing:	March 13, 1974, 1:30 p.m. 1020 "N" Street, Room 102 Sacramento, CA 95814
For Appellant:	Harold A. Irish, Esq. Attorney at Law 45090 Main Street Mendocino, CA 95460
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Karl Engeman Legal Counsel

FINAL ORDER

Underwood Ford-Mercury, Inc., doing business as Underwood-Ford Mercury, an Oregon corporation, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles, following proceedings pursuant to Section 11500 et seq.

Government Code.

The Director of Motor Vehicles, adopting the proposed findings of the hearing officer, found that appellant had: (1) failed in nine instances to give written notice to the department within three days after transfer of vehicles; (2) failed in six instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 20 days; and (3) in 40 instances charged purchasers of vehicles excessive registration fees.

The director further found as follows: (1) appellant's employees also undercharged with respect to said registration fees so that this account was actually short approximately $500; (2) upon notifying appellant of said overcharges, all refunds were promptly made to its customers within two weeks of such notification; (3) such overcharges were the result of the salesman (sic) not carefully consulting the charts with respect to these fees and the lack of a "double check" concerning the amounts charged; (4) as to the late notice and late transfer situations, appellant will adjust its operations to make certain that its salesmen do not retain all paperwork for completion of a sale -- but will submit the required motor vehicle forms to the company office in advance of the other paperwork; (5) appellant has since retained the services of another clerk to assist in processing the company business; (6) the representative of appellant admitted he was not fully

cognizant of the seriousness of the situation, nor that some of the violations constituted misdemeanors; nor that incidents such as to those related tend to destroy the integrity of the department's records, which records are often referred to by law enforcement authorities. Said representative indicated, essentially, that it "...will never happen again. You can bet on it."; and (7) appellant has incurred no known prior violations.

The director, adopting the proposed decision of the hearing officer, proposed the following penalty:

> For the three-day reporting violations, 10 days' suspension; for the 20-day reporting violations, 10 days' suspension; for the fee overcharge violations, 10 days' suspension; all suspensions to run concurrently for a total suspension of 30 days with the entire period stayed for one year under the usual terms and conditions of probation.

The main thrust of this appeal is grounded in the contention that the appellant was denied a fair hearing in two respects. First, the hearing officer failed to advise the appellant of its right to be represented by counsel. And, second, that the accusation is defective.[1/] Only the first of these contentions

---

1/ In his notice of appeal to this board, appellant indicated a desire to augment the record. Appellant neither made such request nor made an offer of proof at the appellate hearing. Accordingly, we consider the request as having been abandoned. In any event, a review of the offer of proof contained in the formal notice of appeal establishes that appellant did not set forth the requisite grounds for augmentation; i. e., that there is relevant evidence which in the exercise of reasonable diligence could not have been produced or which was improperly excluded at the hearing. (Section 3054(e) Vehicle Code. Sections 568(d)(e) and 573, Title 13, California Administrative Code).

merits any extended discussion.

By way of background, the respondent filed its accusation against the appellant on 21 March 1973 together with a written "Statement to Respondent [Appellant]". This statement contained the following language: "If you file any Notice of Defense within the time permitted, a hearing will be had upon the charge made in the accusation. You may, but need not, be represented by counsel at any or all stages of these proceedings." (Emphasis added.) On 27 March 1973, appellant acknowledged receipt of the foregoing documents and requested a hearing to present a defense to the charges in the accusation. On 11 April 1973, the respondent notified the appellant in writing of the time and place of hearing, 26 June 1973, and advised: "You may be present at the hearing; may be represented by counsel of your choice, but need not be represented by counsel if you so desire...." (Emphasis added.) The administrative hearing was held as scheduled and at that time Mr. Underwood confirmed to the hearing officer that, as president of appellant corporation, he would represent the corporation, Underwood Ford-Mercury, Inc. The hearing officer then briefly explained some of the procedures, the burden of proof, the rights to cross-examine, testify and present evidence on behalf of the corporation and offered assistance to the extent possible.

With the foregoing predicate which establishes ample time

between notice and hearing, we can only conclude that with knowledge of its rights to be represented by counsel, the appellant made an informed and conscious decision not to employ counsel and to be represented by Mr. Underwood, appellant's president. It follows that appellant, having made this election, waived its right to be otherwise represented.

In this appeal, appellant contends that prejudicial error was committed when the hearing officer failed to advise Mr. Underwood during the hearing of appellant's right to be represented by counsel, citing the case of Borror vs. Department of Investment (1971) 15 Cal.App.3d 531. We interpret Borror vs. Department of Investment supra as supporting our conclusion that the contention of appellant is without merit. In Borror, the court noted that in proceedings held pursuant to the Administrative Practices Act, there is a statutory requirement that a party be advised of his right to be represented by counsel. In the case before us, the department did comply with this statutory requirement. The court went on to hold, however, that there is no constitutional requirement that the hearing officer advise the party that he is entitled to counsel and that if he cannot afford one, one will be furnished.[2/] (Emphasis added.) This holding is diametrically opposite to the position appellant would now have us sustain so as to find error.

2/ In a proceeding to revoke or suspend a license, it has been held in this state that such proceeding is neither criminal nor quasi-criminal in nature. (Borror vs. Department of Investment supra and cited cases.)

It is important to note at this juncture that at no stage of the proceedings was appellant ever denied the right to be represented by counsel, either by the department or the hearing officer.

What then of the adequacy of Underwood's representation of appellant? We could dispose of this summarily by stating that appellant, having made its election, cannot now be heard to complain. We prefer not to do so, however, and examine this matter in some depth.

There is no question but that Underwood did not have the expertise of an attorney in connection with the technicalities involved in the admission of evidence. This, however, is not controlling for in Borror the court observed that "...even in a criminal case, the trial judge is not required to demand that a defendant, as a prerequisite to defending himself, demonstrate either the acumen or learning of an attorney." In view of the election made regarding representation, any objections to the evidence which were available are considered to have been waived.

The real crux of the matter here is whether Underwood lacked an understanding of the proceedings to the extent that the rights of the appellant were so prejudiced as to impel the conclusion that there was a denial of a fair hearing and due process. To resolve this matter, we have considered the administrative record by its four corners.

First, we are satisfied that the accusation was not defective and sufficiently apprised the appellant of the prohibited conduct (Morrison vs. State Board of Equalization (1969) 1 Cal.3d 214, 231). Second, as to understanding the nature of the accusation, it is evident that Underwood acted neither out of ignorance nor misapprehension. As a dealer of long experience, he demonstrated at the administrative hearing that he was fully cognizant and conversant with late reports and overcharges. By way of defense, he presented an explanation as to how the violations occurred and, in mitigation, testified at length as to the corrective measures which appellant instituted to prevent recurrence of the types of violations involved. As to the effectiveness of the representation, we obliquely observe that the penalty proposed by the hearing officer and adopted by the director, while imposing a 30-day suspension, does not, because of the "stay" require a shut-down of business for even one day. Third, with regard to appellant's understanding of the nature of the penalties involved in this case, the accusation itself recites that by the facts alleged therein, the acts or omissions of appellant [respondent] constitute grounds for revocation or suspension action. Further, and we consider this of singular importance, neither Underwood nor counsel has at any time indicated that appellant was unaware of the penalties which could be imposed in this case. The court's observation in Borror is most pertinent and dispositive

of this matter:

> "It is inconceivable that a licensee is not aware of the sanctions...for violations...and the penalties were in the prayer in the accusation."

From all of the foregoing and in the circumstances of this case, we find that the appellant was accorded a full and fair hearing and was not denied due process of law. The appellant was twice advised in writing of its right to be represented by counsel, there was no requirement that such advice again be given by the hearing officer and this assertion of error is deemed to be without merit.

In view of our determinations herein regarding representation by counsel and due process, we need not address ourselves to other allegations of error in the admissibility of evidence.

Appellant further contends that the decision was contrary to law, arguing that the agency was required to include in its findings of fact the specific reasons or evidence in support thereof citing Henderling vs. Carleson, 36 Cal.App.3d 561. The case cited, Henderling vs. Carleson supra, is inapposite as it was a welfare case wherein both Federal and state law imposed such a requirement. We reject this assigned error as being without merit as we are aware of no authority which supports appellant's position in this case.

Appellant further argues that the hearing officer failed to consider matters of defense in the late reporting violations

in that in 1972 the Vehicle Code was amended to extend the period of reporting set forth in Section 5901 Vehicle Code from 3 days to 5 days. Suffice it to say, all of the Section 5901 violations occurred prior to the effective date of the amending legislation and even had it been in effect, the lapsed time between the true date of sale and receipt of the dealer notices in this case ranged from 9 to 16 days. As to considering extensions of the 20-day period for reports of sale on payment of a $3.00 forfeiture, pursuant to Section 4456.5 Vehicle Code, there is no evidence that such fee was ever tendered or paid by the appellant nor was it ever so contended. This allegation of error is devoid of merit.

With one exception, we find that the weight of the evidence supports the findings and that the decision is supported by the findings. The exception, a matter raised by appellant, concerns an admission by the representative of the appellant that he lacked certain knowledge, phrased in Finding VI(6) as follows: "...nor that incidents such as to those related tend to destroy the integrity of the Department's records which records are often referred to by law enforcement authorities."

Appellant is correct when it avers that there is no evidence whatever to support the hearing officer's finding as quoted above. Accordingly, that portion of Finding VI(6) quoted

is reversed. We deem this reversal to have no impact on the findings as it is irrelevant to the findings of fact that appellant acted or omitted to act in violation of the sections set forth in the accusation. As to penalty, the adverse effect of the language set aside by our reversal is considered to be de minimus. Nevertheless, we have considered such reversal in our deliberations on the findings of fact, determination of issues and penalty as promulgated in the director's decision.

Except for that portion of Finding VI(6) which we reverse, all of the findings of fact and determination of issues are affirmed and we find the penalty to be appropriate and commensurate with the findings as modified.

With the exception of that portion of Finding VI(6) reversed, the Decision of the Director of Motor Vehicles is affirmed.

This order shall be effective May 3, 1974.

JOHN ONESIAN

WINFIELD J. TUTTLE

ROBERT A. SMITH

AUDREY B. JONES

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

A-43-73

D I S S E N T

I dissent. I would reverse the decision and remand the case for a rehearing on the grounds that the department has proceeded in a manner contrary to law. In my view, when it became evident that appellant's representative did not fully understand the proceedings, the hearing officer should have provided the appellant a further opportunity to retain counsel.

W. H. "HAL"McBRIDE

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This order shall be effective _____.

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This order shall be effective_____.

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This order shall be effective_____.

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MELECIO H. JACABAN

A-43-73

D I S S E N T

I dissent. I would reverse the decision and remand the case for a rehearing on the grounds that the department has proceeded in a manner contrary to law. In my view, when it became evident that appellant's representative did not fully understand the proceedings, the hearing officer should have provided the appellant a further opportunity to retain counsel.

W. H. "HAL"McBRIDE

A-43-73

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Except for that portion of Finding VI(6) which we reverse, all of the findings of fact and determination of issues are affirmed and we find the penalty to be appropriate and commensurate with the findings as modified.

With the exception of that portion of Finding VI(6) reversed, the Decision of the Director of Motor Vehicles is affirmed.

This order shall be effective May 3, 1974.

JOHN ONESIAN

WINFIELD J. TUTTLE

ROBERT A. SMITH

AUDREY B. JONES

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

A-43-73

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of THOMAS WAYNE RHODES, dba RHODES MOTOR CENTER, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-44-73 FILED: March 14, 1974

Time and Place of Hearing:	February 13, 1974, 11:00 a.m. Auditorium (First Floor) 2570 - 24th Street Sacramento, CA 95818
For Appellant:	John A. Childers, Esq. Attorney at Law Thompson, Lyders & Laing P. O. Box 968 Ventura, CA 93001
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Karl Engeman Legal Counsel

FINAL ORDER

Thomas Wayne Rhodes, doing business as Rhodes Motor Center, hereinafter referred to as "appellant", appealed to this board

from a disciplinary action taken against the dealer's license by the Department of Motor Vehicles following proceedings pursuant to Sections 11500 et seq. Government Code.[1/]

Because the administrative record raised a question concerning the board's jurisdiction to hear and decide the matter, the parties were afforded an opportunity to file with the board a memorandum of points and authorities on the jurisdictional question.

After reviewing the points and authorities submitted by both parties and considering the oral arguments of the respondent, appellant having elected not to appear in person before the board, we conclude for the reasons discussed hereinafter that the jurisdictional limitations imposed by statute preclude us from hearing and deciding the merits of this appeal.

FACTS

The pertinent facts in brief are that the appellant has been licensed as a dealer since 1956 and subsequently was enfranchised to sell Triumphs and Fiats. Appellant's franchise to sell Triumphs was terminated May 15, 1970, and the department received notification of such action from the franchisor on May 18, 1970. The franchise to sell Fiats was terminated on June 1, 1970, however, the department was not aware of this information until on or about October 16,

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1/ The board takes official notice of the fact made known to it during respondent's argument that there is now pending a petition for writ of mandamus filed by Thomas Wayne Rhodes vs. Department of Motor Vehicles. This petition for writ of mandamus was filed in the Superior Court of the State of California for the County of Ventura on August 30, 1973.

1973, when it requested confirmation from the franchisor, which was received in a letter dated October 18, 1973. During each of the years in which appellant held a motor vehicle dealer's license, 1970 through 1973, he paid the fee to the department which this board prescribed for the issuance or renewal of a license to do business as a new car dealer (Section 11723 Vehicle Code and Section 553, Title 13 Cal. Admin. Code). When the department discovered that the Fiat franchise had been cancelled, it retrieved from the appellant the 1971, 1972 and 1973 new vehicle report of sales books and advised him that he could apply for a refund of the fees paid which were required of new car dealers. In the interim, because of the computer system utilized by the department, a renewal card was mailed to the appellant requesting the renewal fee and the new car dealer fee for 1974. Both were paid by appellant. Upon this discovery, the department retrieved from the appellant his 1974 new report of sale books and processed a refund of the new car dealer's fee. 2/

All violations in this case occurred from September 1970 through March 1971, subsequent to the termination of the Fiat franchise on June 1, 1970.

2/ There is no evidence or indication that appellant's dealer license was suspended or revoked at any time or that the department denied him report of sale books for used cars. According to respondent's oral argument, dealer's licenses issued are not designated as "new car dealer's license" or "used car dealer's license". Both are issued as "dealer license", the only difference being in the distribution of new vehicle report of sale books to those dealers who state to the department that they are enfranchised to sell new cars.

RELEVANT STATUTES

The jurisdiction of this board is circumscribed by Sections 3051 and 426 Vehicle Code as follows:

> "3051. The provisions of this chapter are not applicable to any person licensed as a manufacturer or transporter or salesman under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5, or to any licensee thereunder who is not a new car dealer. The provisions of this chapter shall be applicable to a new car dealer or any person who applies for a license as, or becomes, a new car dealer as defined in Section 426."

> "426. 'New car dealer' is a dealer, as defined in Section 285, who, in addition to the requirements of that section, acquires for resale new and unregistered motor vehicles (excluding motorcycles as defined in Section 400 of this code) and new and unregistered trucks from manufacturers or distributors of such motor vehicles and trucks. No distinction shall be made, nor any different construction be given to the definition of 'new car dealer' and 'dealer' except for the application of the provisions of Chapter 5 (commencing with Section 3000) of Division 2 of this code, which chapter shall apply only to new car dealers as defined in this section."

DISCUSSION

At the outset, it is appropriate to observe that an administrative tribunal has the power to determine its own jurisdiction in the first instance (2 Cal.Jur.3d §150, citing United States vs. Superior Court 19 Cal.2d 189; 120 P.2d 26). This truism has its origin mainly in the cases holding that a court has inherent power to inquire into its jurisdiction of its own motion regardless of whether the question is raised by

the litigants (Abelleira vs. District Court of Appeal, 17 Cal.2d 280; 109 P.2d 942).

While we take cognizance of all the pertinent events which transpired as set forth above, the crux of the question before us is what the status of the appellant was at the time of the violations; i. e., from September 1970 through March 1971.

There is no evidence in the administrative record nor has any representation been made by the appellant[3/] that since June 1, 1970, he has sold or has been enfranchised to sell new cars, or more particularly within the statutory definition (Section 426 Vehicle Code) that he has acquired for resale new and unregistered motor vehicles or trucks from manufacturers or distributors of such motor vehicles or trucks.

We do find in appellant's points and authorities language which by strong implication negates any position that he did fall within the Vehicle Code definition. At page 3, lines 20 through 30, of appellant's memorandum filed January 14, 1974, we find: "Section 3051 makes no provision for the present situation where a new car dealer licensee continues to hold a new car dealer's license but ceases to acquire new and unregistered motor vehicles for resale." (Underscoring supplied.)

3/ In the usual case, the record contains abundant references to the appellant's acquisition and sale of new cars. Such is not the case here. The appellant in the instant case has failed to supply a sufficient evidentiary basis for the Board's jurisdiction.

Subsequently, we find at page 2, lines 11 through 15, of appellant's supplemental memorandum the following language: "Respondent also ignores the fact that being the holder of a new car dealers license, appellant could have acquired unregistered vehicles from other dealers and sold them had it been appropriate in the appellant's business." (Underscoring supplied.)[4/]

In these sections quoted, we disregard appellant's conclusion that he was a new car dealer for it is that issue which is before us for decision. The underscored portions, however, when considered together appear as an unequivocal admission that appellant since June 1, 1970, has not acquired for resale any new and unregistered vehicles. Thus, at the time of the violations, he was outside the purview of the definition of a "new car dealer" and did not fall within the board's jurisdictional boundaries fixed by the Legislature. This is so, notwithstanding the fact that he paid new car dealer's fees and was furnished the documentation by the department to originate new vehicle titles.

The status appellant would now have us find so as to bring him within our jurisdiction was actually the results of his

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4/ The Vehicle Code contains no definition of the term "distributor" but in the posture of the present case, we need not address this matter.

own failure to comply with a requirement of the Vehicle Code.[5/] However, in view of the basis for our conclusion resting squarely on our interpretation and application of the definitions cited above, we need not concern ourselves with any discussion of estoppel. Further, because we are concerned here with jurisdiction of this board, a matter granted and circumscribed by the Legislature, we consider the acts of the department in collecting new car dealer fees from the appellant and issuing him new vehicle report of sale books as having no impact on our determination herein.

CONCLUSION

The appeal filed in the above-entitled case is hereby dismissed on the grounds that the board lacks jurisdiction. This dismissal shall become effective upon the filing of this Final Order.

WINFIELD J. TUTTLE THOMAS KALLAY

GILBERT D. ASHCOM MELECIO H. JACABAN

AUDREY B. JONES

A-44-73

5/ Section 11712(b) Vehicle Code provides: "Should the dealer change to or add another franchise for the sale of new vehicles, or cancel or, for any cause whatever, otherwise lose a franchise for the sale of new vehicles, he shall immediately so notify the department.

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CONCLUSION

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WINFIELD J. TUTTLE

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A-44-73

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CONCLUSION

The appeal filed in the above-entitled case is hereby dismissed on the grounds that the board lacks jurisdiction. This dismissal shall become effective upon the filing of this Final Order.

WINFIELD J. TUTTLE

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A-44-73

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CONCLUSION

The appeal filed in the above-entitled case is hereby dismissed on the grounds that the board lacks jurisdiction. This dismissal shall become effective upon the filing of this Final Order.

WINFIELD J. TUTTLE

THOMAS KALLAY

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A-44-73

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CONCLUSION

The appeal filed in the above-entitled case is hereby dismissed on the grounds that the board lacks jurisdiction. This dismissal shall become effective upon the filing of this Final Order.

WINFIELD J. TUTTLE — THOMAS KALLAY

GILBERT D. ASHCOM — MELECIO H. JACABAN

AUDREY B. JONES

A-44-73

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above, we need not concern ourselves with any discussion of estoppel. Further, because we are concerned here with jurisdiction of this board, a matter granted and circumscribed by the Legislature, we consider the acts of the department in collecting new car dealer fees from the appellant and issuing him new vehicle report of sale books as having no impact on our determination herein.

CONCLUSION

The appeal filed in the above-entitled case is hereby dismissed on the grounds ~~that jurisdiction of~~ this board lacks jurisdiction is lacking. This dismissal shall become effective upon the filing of this Final Order.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

A-44-73

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of DICK GRIHALVA CHEVROLET, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-45-73 FILED: May 31, 1974

Time and Place of Hearing:	May 8, 1974, 11:00 a.m. 1020 "N" Street, Room 102 Sacramento, CA 95814
For Appellant:	George E. Leaver, Esq. Attorney at Law Getz, Aikens & Manning 5900 Wilshire Blvd., Suite 770 Los Angeles, CA 90036
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Henry J. Ahler Legal Counsel

FINAL ORDER

Dick Grihalva Chevrolet, a California corporation, enfranchised as a new car dealer, hereinafter referred to as

"appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that appellant: (1) failed in 23 instances to give written notice to the department within three days following the transfer of the vehicles; (2) failed in 265 instances to mail or deliver the reports of sale of new vehicles (together with documents and fees) to the department within 20 days; (3) failed in three (3) instances to mail or deliver reports of sale (together with documents and fees) to the department within 30 days; (4) in 40 instances charged purchasers of vehicles excessive registration fees.

The director, adopting the hearing officer's proposed decision, imposed the following penalty:

> For the 3-day notice violations, 5 days' suspension; for the 20-day notice violations, 10 days' suspension; for the failure to report in 30 days, 15 days' suspension; for the overcharges, 10 days' suspension; all suspensions to run concurrently for a 15-day suspension with 14 days stayed for a period of one year under the usual terms and conditions of probation.

The only issue before us on appeal is the appropriateness of the penalty with the appellant contending that under all of the circumstances of this case the penalty is too harsh and severe and should be reduced to provide for only a 10-day suspension, with all of the ten days stayed for a one-year period of probation under the terms as set forth in the director's decision. We disagree.

Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective June 28, 1974.

WINFIELD J. TUTTLE

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

PASCAL B. DILDAY

AUDREY B. JONES

A-45-73

The only issue before us on appeal is the appropriateness of the penalty with the appellant contending that under all of the circumstances of this case the penalty is too harsh and severe and should be reduced to provide for only a 10-day suspension, with all of the ten days stayed for a one-year period of probation under the terms as set forth in the director's decision. We disagree.

Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective_____.

WINFIELD J. TUTTLE

THOMAS KALLAY

ROBERT A. SMITH

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PASCAL B. DILDAY

AUDREY B. JONES

A-45-73

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Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective_____.

WINFIELD J. TUTTLE

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

PASCAL B. DILDAY

AUDREY B. JONES

A-45-73

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Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective _____.

WINFIELD J. TUTTLE

THOMAS KALLAY

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A-45-73

The only issue before us on appeal is the appropriateness of the penalty with the appellant contending that under all of the circumstances of this case the penalty is too harsh and severe and should be reduced to provide for only a 10-day suspension, with all of the ten days stayed for a one-year period of probation under the terms as set forth in the director's decision. We disagree.

Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective _____.

WINFIELD J. TUTTLE

THOMAS KALLAY

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AUDREY B. JONES

A-45-73

The only issue before us on appeal is the appropriateness of the penalty with the appellant contending that under all of the circumstances of this case the penalty is too harsh and severe and should be reduced to provide for only a 10-day suspension, with all of the ten days stayed for a one-year period of probation under the terms as set forth in the director's decision. We disagree.

Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective_____.

WINFIELD J. TUTTLE

THOMAS KALLAY

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AUDREY B. JONES

A-45-73

The only issue before us on appeal is the appropriateness of the penalty with the appellant contending that under all of the circumstances of this case the penalty is too harsh and severe and should be reduced to provide for only a 10-day suspension, with all of the ten days stayed for a one-year period of probation under the terms as set forth in the director's decision. We disagree.

Having duly considered the administrative record and appellant's briefs and argument before this board on appeal, we find the penalty imposed by the Director of Motor Vehicles to be appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This final order shall become effective June 28, 1974.

WINFIELD J. TUTTLE

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

PASCAL B. DILDAY

AUDREY B. JONES

A-45-73

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of BOB FRINK CHEVROLET, INC., A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-46-73 FILED: March 8, 1974

Time and Place of Hearing:	February 13, 1974, 1:30 p.m. Auditorium (First Floor) 2570 - 24th Street Sacramento, CA 95818
For Appellant:	Jack W. Urch, Esq. Attorney at Law 2131 Capitol Ave., Suite 300 Sacramento, CA 95816
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Karl Engeman Legal Counsel

FINAL ORDER

Bob Frink Chevrolet, Incorporated, a California corporation, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license

by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed findings of the hearing officer, found that appellant had: (1) failed in five instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 424 instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 20 days; (3) failed in three instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 30 days; (4) in ten instances falsely reported true date of sale in application for registration; (5) in three instances filed with the department false certificates of non-operation; and (5) in 38 instances charged purchasers of vehicles excessive registration fees.

In addition, the following facts in mitigation were found: (1) appellant has no prior record of disciplinary action before the department; (2) appellant has paid all fees and penalties due the department for registration of those vehicles involved in the accusation; (3) appellant has refunded all excess registration fees described in the accusation; and (4) appellant has replaced all personnel responsible for its acts which led to the filing of this accusation, and has engaged others to insure that all reports required shall be submitted to the

department within the time demanded by law.

The director, modifying the hearing officer's proposal, imposed the following penalty:

> One day's suspension for the three-day notice violations of failing to report sales within 20 days; one day's suspension for the violations of failing to report sales within 30 days; five days' suspension for reporting false dates of sale; three days' suspension for filing false certificates of non-operation; all suspensions to run concurrently for a total of five days' suspension.

The major thrust of this appeal is threefold. First, the appellant contends that he was deprived of a fair and impartial hearing; second, that the corporation should not be subjected to license discipline for the negligence or malfeasance of its employees; and, third, that the punishment is too harsh and denies "equal treatment with other licensees similarly situated."

We will address each of these contentions briefly.

Appellant's assertion that it was deprived of a fair and impartial hearing is predicated on the proposed decision of the hearing officer recommending an inordinate penalty suspending appellant's license for 2,120 days and on the failure of the

hearing officer to include in his findings of fact all of the mitigating circumstances appellant would have included. Based on this, appellant concludes that the hearing officer was either biased, prejudiced or not sufficiently competent to understand the "realities" of the case, anyone of which grounds deprived him of a fair and impartial hearing.

In our view, appellant's conclusion is purely hypothesis and lacks evidentiary basis. Moreover, the posture of this case is such that it permits us to render a decision without any reservations in this area of appeal. With regard to the proposed penalty of 2,120 days' suspension, this was reduced by the director in his decision to a total of five days' suspension.[1/]

It is not the hearing officer's proposal but the director's decision which is before us on appeal and we will comment on the appropriateness of the penalty contained therein in our subsequent discussion.

As to the findings of fact and hearing procedures, we are completely satisfied that no error was committed. The reporter's transcript establishes that at the administrative hearing, appellant, by stipulation, admitted to the truth of all the factual matters set forth in the accusation. During oral argument before this board, the appellant unequivocally stated

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1/ In the brief filed by the respondent, the penalty proposed by the hearing officer was interpreted to be a total suspension of only 45 days. In light of the director's action on the penalty, no useful purpose would be served to discuss or attempt reconciliation of the two viewpoints.

that no factual matters regarding the accusation were being contested nor was it contended that the hearing procedures were unfair or that they in any way denied him any rights so as to create a fair risk of prejudice.

Addressing the allegation that the hearing officer failed to make findings of fact covering all of the mitigation offered by the appellant at the administrative hearing, Section 3054, subsection (d), Vehicle Code, requires the board to use the independent judgment rule when reviewing the evidence. (Thiel Motors, Inc. vs. Department of Motor Vehicles, A-33-72, and cited cases.) Accordingly, our review takes into consideration all of the evidence presented at the hearing, thereby obviating any error, if such did exist, in the hearing officer's failure to make a finding of fact as to some mitigating factors.[2/] In the circumstances of this case, we find appellant's contention that it was deprived of a fair and impartial hearing to be devoid of merit.

We turn next to the contention that the corporation should not be subjected to license discipline for the negligent or wrongful acts of its employees. We dispose of this contention by reference to our holding in Suburban Ford vs. Department of Motor Vehicles, A-35-73, to the effect that it is well settled

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2/ The record provides no basis upon which to conclude that the hearing officer abused his discretion in omitting from his findings of fact mitigation which appellant contends should have been reduced to formal findings.

that the revocation or suspension of a license is not penal in nature (citing Zar Motors vs. Department of Motor Vehicles, A-17-71) and to our holding in Imperial Motors vs. Department of Motor Vehicles, A-28-72, wherein we stated:

> "A corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline." (See also Bishop-Hansel Ford vs. Department of Motor Vehicles, A-39-73; Main Toyota, Inc., vs. Department of Motor Vehicles, A-37-73.)

During oral argument before the board, appellant sought to absolve the corporation from responsibility by attempting to place it at the lower supervisory levels. We can only observe that supervision extends upwards and at the top of the ladder is the dealer-corporation which must bear its burden for failing to exercise proper supervision. Accordingly, in considering mitigation, we can attach little weight to the argument that the dealer's problems resulted from "poor supervision."

Lastly, we must consider the appropriateness of the penalty of five days' suspension imposed by the director's decision.

We have no reason to reject appellant's argument that appellant has revamped its operation to insure that no violations will occur in the future. The penalty imposed, however, was for violations which occurred in the past when the appellant failed to insure compliance with the requirements of

the law. We have expressed our views on many occasions on the degree of responsibility to which a dealer must be held with particular regard to the seriousness of delinquent reporting, filing false dates of sale and false certificates of non-operation, and charging excessive registration fees.

While we recognize that some of the violations were most probably precipitated by appellant's employees, there is also evidence of record that appellant had been employing an experienced manager.

Further, we cannot overlook the fact that prior to the audit, the appellant's policy was to hold all "DMV" work until money was received from the finance companies. Such a practice provided the environment conducive to intentional contraventions of the requirements imposed by law for timely reporting, and the responsibility for resulting violations must rest squarely on the corporate entity. As we concluded in Main Toyota vs. Department of Motor Vehicles, supra, which language is pertinent to the instant case, "It is clearly evident that the appellant did not meet its responsibility and must be held to account." As for the contention that the punishment denies appellant "equal treatment with other licensees similarly situated", suffice it to say that each case must be decided on its own merits. We have applied this guideline axiomatically to the case at hand.

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This order shall become effective April 5, 1974.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This order shall become effective _____.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

A-46-73

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This order shall become effective_____.

WINFIELD J. TUTTLE

THOMAS KALLAY

Gilbert D. Ashcom
GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This order shall become effective_____.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This order shall become effective_____.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This order shall become effective _____.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

Audrey B. Jones

AUDREY B. JONES

A-46-73

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

DOWNTOWN FORD SALES, A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-47-73 Filed: April 3, 1974

Time and Place of Hearing:	March 13, 1974, 11:00 a.m. 1020 "N" Street, Room 102 Sacramento, CA 95814
For Appellant:	Sy Dennis, Jr., Esq. Attorney at Law Suite 210, 930 G Street Sacramento, CA 95814
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Henry Ahler Staff Counsel

FINAL ORDER

Downtown Ford Sales, a California corporation, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by

the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed findings of the hearing officer, found that appellant had on seven different days caused to be published in a newspaper advertisements which were misleading in that the advertisements used headings "New Car Invoice Sale" or "Invoice Sale" and "New Car" when one or more of the vehicles to which the headings referred were in fact demonstrators. Further findings of the director pertinent to this decision found that in the small type which more particularly described the vehicles which were advertised, the word "demonstrator" did appear where the vehicle was in fact a demonstrator; the overall appearance of the advertisements was that the vehicles listed in that section of the advertisements were new vehicles; that true facts could only be ascertained by reading the fine print descriptions; and that appellant in the exercise of reasonable care should have known that the advertisements were misleading but did not exercise that care.

The director determined that a cause for discipline existed pursuant to Section 11713(a) of the Vehicle Code and Section 432.00 of Title 13, California Administrative Code, and imposed the following penalty:

Suspension of the dealer's license, certificate and special

plates for a period of two (2) days, with the entire suspension stayed for a period of one year, during which time the appellant would be on probation, under the usual terms and conditions.

Appellant filed no briefs in this case but in oral argument stated that the basis of his appeal was two-fold: first, that the findings are not supported by the evidence and that the decision is not supported by the findings; and, second, that the penalty is excessive.

In light of our decision herein, we need only address the first basis of appeal. In our view, the sole issue controlling the resolution of this appeal is whether the advertisements were misleading.

The section of the California Administrative Code, Section 432.00 of Title 13, which concerns itself with automobile dealers advertising regulations and implements Section 11713 of the Vehicle Code states in pertinent part: "...in cases where a vehicle may be registered as a new vehicle with the department, but in fact is a demonstrator... it shall not be advertised as a new vehicle."

With full cognizance of the provisions of Section 11713(a) Vehicle Code and the pertinent provisions of Section 432.00 California Administrative Code supra, we have carefully scrutinized the advertisements in question and conclude none were misleading. Had the word "demonstrator" been omitted

from the description of the respective vehicles, we would have no hesitancy in finding that the advertisements were misleading and constituted the malfeasance within the contemplation of the Vehicle Code, as implemented. However, such is not the case here and to reiterate the findings of the director in his decision, "The word demonstrator did appear where the particular vehicle was in fact a demonstrator."

Because of the foregoing, we do not perceive that any of the advertisements when considered in their entirety could leave any impression other than that several of the vehicles listed were demonstrators. Consequently, and in the circumstances of this case, we reject respondent's argument that the yardstick to be applied is that of "general impression". Perhaps, in other cases involving omission or erroneous or equivocal representations such a guideline would be the proper one. In the instant case, however, the issue before us requires resolution on a more specific basis; i. e., did the advertisements in fact contain misleading information. We find that they did not. The specific disclosure that certain advertised vehicles were demonstrators removed the "misleading" element and effectively absolved the dealer from license discipline liability. This is not to say, however, that whoever composed or inserted the advertisements containing inconsistent information exercised the best judgment, but this shortcoming

cannot be equated to actions in violation of the Vehicle Code.

One other aspect of respondent's position merits brief comment. As we already know, if a reader was interested in a particular vehicle listed in any one of the advertisements and it was a demonstrator, it was clearly so identified. Respondent argues that this should have no substantial impact on the issue before us because the word "demonstrator" was in small print. We disagree. From our examination of the advertisements, we find that most of the information concerning all of the advertised vehicles (i.e., the description, accessories, identification number, etc.) was printed in the same size type as the word "demonstrator". The significance of this lies in the fact that the respondent did not at any stage of the proceedings in this case offer or produce evidence of a standard for the size of type in which the word "demonstrator" was required to be set when used in an advertisement such as the one before us. Moreover, respondent's emphasis on the fact that the word "demonstrator" was in small print creates a strong inference that had the size of the type used been larger, no violations would have occurred. We prefer, however, not to attach any weight to this inference and base our decision on our findings and conclusion that none of the advertisements were in fact misleading.

For the reasons stated, we do not find sufficient evidence

to support the findings of the director.

The Decision of the Director of Motor Vehicles is reversed in its entirety.

This Final Order shall become effective when served upon the parties.

JOHN ONESIAN

AUDREY B. JONES

W. H. "HAL" McBRIDE

GILBERT D. ASHCOM

ROBERT A. SMITH

PASCAL B. DILDAY

MELECIO H. JACABAN

A-47-73

to support the findings of the director.

The Decision of the Director of Motor Vehicles is reversed in its entirety.

This Final Order shall become effective when served upon the parties.

Audrey B. Jones

JOHN ONESIAN

AUDREY B. JONES

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A-47-73

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of WILLIAM L. HUGHSON CO., INC., dba HUGHSON FORD SALES, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-48-73 FILED: July 11, 1974

Time and Place of Hearing:	June 12, 1974, 11:15 a.m. State Building, Room 1202 350 McAllister Street San Francisco, CA 94102
For Appellant:	E. Conrad Connella Connella & Sherburne Central Tower Building, Suite 1700 703 Market Street San Francisco, CA 94103
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Legal Counsel

FINAL ORDER

William L. Hughson Co., Inc., doing business as Hughson Ford Sales, a California corporation, enfranchised as a new car dealer,

hereinafter referred to as "appellant" appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that appellant: (1) failed in 8 instances to give written notice to the department within 3 days after transfer of vehicles; (2) failed in 53 instances to mail or deliver reports of sale (with documents and fees) to the department within 20 days; (3) in one instance falsely reported true date of sale in application for registration; (4) in 4 instances charged purchasers of vehicles excessive registration fees; (5) in one instance disconnected, turned back or reset an odometer to reduce the mileage indicated on the odometer.

In addition, the director adopted the following findings of the hearing officer: appellant introduced evidence which established that its average sales volume is 300 to 400 vehicles per month, including new and used passenger cars and trucks; there are a total of 110 employees, including 25 salesmen; the original owners of the corporation sold their stock to several of their employees, who are now operating the corporation.

The director, adopting the hearing officer's proposed decision, imposed the following penalty:

For the 3-day notice violations, 15 days' suspension with 10 days stayed; for the 20-day reporting violations, 15 days'

suspension with 10 days stayed; for the odometer violation, 15 days' suspension with 10 days stayed; for the false reporting of true date of sale, 15 days' suspension with 10 days stayed; for the overcharges, 5 days' suspension with 4 days stayed; all suspensions to run concurrently for an actual 5 days' suspension with one year's probation on the usual terms and conditions.

In sum and substance, the major points of appellant which require our attention on this appeal are threefold: (1) the findings regarding the odometer violation (Finding VII) are not supported by the weight of the evidence; (2) the accusation and findings regarding the false reporting of the true date of sale (Finding V) are deficient in that they omit any reference to the element of "knowledge" and the violation was in fact a product of "clerical error"; and (3) the determination of penalty with regard to the findings of late reporting and charging excessive registration fees (Findings III, IV and VI) is not commensurate with these findings.[1/]

We will consider the matters raised by this appeal in their respective order.

1. THE FINDINGS REGARDING THE ODOMETER VIOLATIONS (FINDING VII) ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Consideration of this assigned error requires a summary of the

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1/ In furtherance of its desire to augment the record as contained in its notice of appeal, appellant made an offer of proof to the board pursuant to §573, Title 13, Subchapter 2, Article 3, and §3054(e) Vehicle Code. Appellant's showing that there was relevant evidence which in the exercise of reasonable diligence could not have been produced at the hearing was deemed insufficient. Accordingly, the request for augmentation of the record was denied.

significant evidence. On March 28, 1972, the appellant purchased from Jones Minto Ford a 1970 Ford, license number 762BDA. As evidenced by used car wholesale purchase orders maintained in the files of appellant and Jones Minto Ford, both of these documents reflect the mileage of the vehicle on the date of purchase as 43,846. A "get ready purchase order" of appellant's, dated March 29, 1972, ordered from Mark Morris Tire Company one recapped tire for the Ford (license number 762BDA) and reflects the mileage of the vehicle at that time as 32,545. This document was signed by Loschy, appellant's used car manager. An invoice from Mark Morris Tire Co. to appellant dated March 29, 1972, also reflects the mileage of the vehicle as 32,545. An internal document of appellant, apparently executed on March 31, 1972, records a sale of this vehicle by N. Javier to one Arthur R. Palou on March 29, 1972, and cross-references the purchase order for the recapped tire. The factual information, as set out above, was corroborated by affidavits and there was no contest that the odometer of the Ford in question had in fact been turned back.

On behalf of the appellant, Napoleon Javier, sales manager and vice president of appellant corporation, testified that he was personally involved in the sale of the 1970 Ford, license number 762BDA, which was the vehicle involved in the odometer turn-back. According to Javier, he sold a 1970 Ford, license number 889ARH, to his friend, a Mr. Palou, for shipment to the Philippines. This car had 34,456 miles on the odometer and the purchase price was $3,004.94.

Immediate registration was necessary as the Philippine Government levied a tax if the car was not used in the United States 90 days prior to shipment. On March 20 a messenger was sent to Sacramento to register the vehicle but did not do so because he was advised by Loschy not to effect registration as the car had been sold to someone else. Although the "pink slip" had been made out to Palou, it was voided and a duplicate "pink slip" was made out for the purchaser. Loschy advised him not to worry as he had an exact replacement car.

On March 28, 1972, the replacement car, license number 762BDA, was purchased and it had mileage of 43,846 miles. According to Javier, on the night of March 28, Palou came to his home for dinner and was offered the car at $2,850 because of the mileage. Palou inspected the car and took possession of it that night on the condition that it would be stored at Hughson Ford for 90 days and then shipped to him in the Philippines. Javier was to pay appellant for the car and Palou was to reimburse Javier by making payment to Javier's mother in the Philippines. Palou drove off with the car that night and it was stored at Hughson Ford the next morning, March 29, at which time, according to Javier, "The car already belonged to him [Palou] fully registered with the pink slip." Palou drove the car on weekends and it remained at Hughson Ford for about 4 months before it was shipped.

Sometime after his return from the Philippines, Javier was

surprised when a Department of Motor Vehicles investigator showed him that on March 29, 1972, a tire had been installed on the car (license number 762BDA) at Mark Morris Tire Co. and that there was a discrepancy in the mileage. At that time the car had already been shipped and he had no knowledge of how the mileage got to be 32,545 miles.

At the time he examined the affidavits received in evidence at the administrative hearing, it was apparent to him that the sale to Palou was consummated on March 28 and that the Mark Morris Tire Co. document showing the reduced mileage was dated March 29, the day after. "What the man [Palou] would do with the car after he owned it, he does not know and could not say."

Included in the affidavits referred to by Javier were those of Loschy and appellant's general manager, Tholin. These affidavits establish that Loschy, in company with Tholin, personally went to the Mark Morris Tire Co. on the afternoon of March 29 to verify the odometer reading of the Ford as that reflected on the tire invoice; i. e., 32,545 miles. Both Loschy and Tholin were part owners of appellant corporation and both terminated their employment with appellant in April 1972.

According to Javier, both Loschy and Tholin wanted him out as a part owner but Ford Motor Company insisted that, as a top producer, he remain. During the years he worked with Loschy at Hughson Ford, Loschy made life very difficult for him by impeding

his sales in many ways.

Hellman, appellant's president and major stockholder, corroborated Javier's statement that the other owners were jealous of him (Javier) because of the large amount of money he was making, Loschy and Tholin in particular, and there was considerable animosity. The first he heard about the odometer matter was when Javier told him about the department's investigators. He knew nothing about who was responsible for the alleged violation.

Section 3054(d) Vehicle Code requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to weigh the evidence, to resolve conflicts in our own minds, draw such inferences we believe to be reasonable and make our own determination regarding the credibility of witnesses and testimony in the transcript of the administrative proceedings. (Ruffner Trailers, Inc. v. Department of Motor Vehicles, A-36-74, and cases cited.)

Counsel for the respondent, in argument at the administrative hearing, aptly summed up the problem which, in connection with this accusation, seemingly has been present right from the beginning. He observed, "Now the only mystery remaining is: who spun the odometer?"

Without question, under the theory of agency, if Javier turned back the odometer himself or arranged or conspired to have it accomplished, the responsibility rests with the appellant. However,

the posture of the evidence in this case makes it difficult for us to reach the respondent's "inescapable conclusion" that it was Javier who was culpable.

Javier's testimony is to the effect that he sold the car to Palou on the night of March 28 and that the car was in Palou's possession until it was returned to Hughson Ford sometime during the morning of March 29. Whether or not a sale under the definition of §5901 Vehicle Code was consummated on the night of March 28 need not be decided for if Palou, on his own, turned back or had someone turn back the odometer while the car was in his possession, such wrongful action cannot properly be imputed to appellant. There is no evidence that Palou was an officer, employee or agent of the appellant corporation. Further, Javier's testimony regarding Palou's possession stands unrefuted and there is nothing to establish that a conspiracy existed between the two.

To carry the matter of the inconclusiveness of the evidence further, let us consider the affidavit of Loschy. He stated that, after being informed of the car's delivery to Javier's home on March 28, he did not see the car until the afternoon of March 29 at Mark Morris Tire Co. where he observed the reduced mileage. Yet Exhibit "4", a "get ready purchase order" for the recapped tire dated March 29 and bearing Loschy's signature, shows the mileage as 32,545. This evidence was relied on heavily by the respondent to show that no sale had been made because the car was being made

ready to sell and a recapped tire was to be put on by Mark Morris Tire Co. The inconsistency which manifests itself here is how did Loschy know when he prepared the "get ready purchase order" that the mileage on the car was 32,545 if he didn't see the car until sometime later that day. Moreover, if Loschy knew that the mileage was 32,545 at the time he prepared the "get ready purchase order" for Mark Morris, why then was it necessary for him to go to the tire company, read the odometer and verify the lowered mileage? We weigh this evidence bearing in mind that there was considerable animosity between Javier and Loschy and Tholin.

What this all adds up to in our view is that the evidence points the finger of suspicion at several individuals; but evidence which merely creates suspicion, however strong that suspicion might be, is insufficient to support a finding. In our view the case presented by the department as to the odometer violation is not free of substantial doubt. Clear and convincing evidence is not contained in the record before us proving any violation by the appellant of Section 11713(n) Vehicle Code. Therefore, we conclude that the weight of the evidence fails to support Finding of Fact VII. Accordingly, Finding of Fact VII is reversed.

2. THE ACCUSATION AND FINDINGS REGARDING THE FALSE REPORTING OF THE TRUE DATE OF SALE (FINDING V) ARE DEFICIENT IN THAT THEY OMIT ANY REFERENCE TO THE ELEMENT OF "KNOWLEDGE".

The accusation which resulted in this finding concerns the report

of sale submitted to the respondent in connection with the sale of the 1970 Ford license number 762BDA sold to Palou on or about March 28, 1972. The report of sale in evidence shows the date sold as "3/20/72". To support its case, respondent also introduced in evidence a statement of facts to authorize Hughson Ford to pick up the title and registration of the said vehicle and a power of attorney, all dated March 20, 1972. The circumstances surrounding this sale have been previously set forth.

On examination by the hearing officer, Javier explained that the sale of the first Ford to Palou (license number 889ARH) was rescinded. Since the second car was not bought from Jones Minto Ford until March 28, the report of sale showing a sale to Palou on March 20 clearly was error and a mixup due to the confusion brought about by the two sales and the rescission of one because of a prior sale. Even though the power of attorney and certificate for the second car were dated March 20, these dates were the result of clerical inadvertence. The clerk must have used the same registration papers for the first car as the second. To support this, Javier offered a check drawn by Palou dated March 22, 1972, made out to the Department of Motor Vehicles in the amount of $23.00 for registration fees for the first car.

There was no contest that the purchase date of the 1970 Ford (license number 762BDA) by appellant was March 28, 1972. The record of transcript contains no evidence, however, tending to refute Javier's contentions of "inadvertence" and "clerical error".

The statute with which we are here concerned is §11705(3) of the Vehicle Code which reads in pertinent part:

> "Has...knowingly made any false statement, or knowingly concealed any material fact in any application for registration of a vehicle..." 2/ (Underscoring supplied.)

Appellant's preliminary contention here is that the pleadings are defective since the accusation charges no violation of any section of the code. Appellant fails to take cognizance, however, of Paragraph VIII of the accusation which recites that by reason of the facts alleged in the preceding paragraph (which includes the false statement accusation) appellant [respondent] has been guilty of acts or omissions or both constituting grounds for revocation or suspension of the license, certificate and special plates under §11705 of the Vehicle Code. We consider this contention to be devoid of merit as suspension or revocation action may be predicated not only on violations but for any of the acts proscribed in §11705 Vehicle Code. Knowingly making a false statement is one of the acts proscribed in §11705 Vehicle Code.

This brings us to the first major contention; i. e., that the accusation is defective in that it failed to charge that the false reporting was knowingly made. We can dispose of this asserted error readily by reference to footnotes 4 and 5, §11503 Government Code, and cited cases, which hold that the primary objective of an

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2/ Appellant's brief makes reference only to §20 Vehicle Code which states that, "It is unlawful to...knowingly make any false statement or knowingly conceal any material fact in any document filed..." (Underscoring supplied.)

accusation is to give fair notice to an accused rather than to adhere strictly to the technical rules of pleading. Clearly, appellant in this case was fully apprised of the accusation and presented a defense to this charge. Even assuming arguendo that the accusation was defective, no objection was made at the hearing and appellant proceeded with its defense. This constituted a waiver and appellant may not now be heard to complain. (Footnote 7, §11503 Government Code; 1 Davis, Administrative Law §8.04.)

We turn now to address the second part of this asserted error, that the findings of the hearing officer are defective as they omit the language of the statute that the act was done "knowingly".

To begin, we are cognizant of the liberal rules regarding findings. As stated in 2 Cal.Jur.III §227, findings "...may be general as long as they satisfy the requirements of making intelligent review possible...and apprising the parties of the basis for administrative action". We are also cognizant of the rule permitting implied findings, 2 Cal.Jur.III §228 (See also Cal.Admin. Agency Practice CEB §§423, 424, 425, 427). However, an administrative agency has a duty to find on all of the issues that are properly and adequately raised by the evidence, 2 Cal.Jur.III §223.

In the case before us the appellant presented an affirmative defense of what amounted to mistake of fact predicated on "inadvertence" and "clerical error". Whether appellant knowingly made a false statement was thus clearly raised in issue.[3/] Accordingly,

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3/ We are not here concerned with the issue of appellant's responsibility as a corporation for the acts of its officers, employees or agents.

it was essential that a specific finding be made that the act was done knowingly; i. e., "with knowledge; consciously; willfully; intentionally." (Black's Law Dictionary Revised Fourth Edition, Pg. 1012 and cited cases." In the absence thereof, an intelligent review of this finding is precluded. We are left to ponder whether in the decision the matter of knowledge was overlooked or considered to be a non-essential element of the "violation" constituting grounds for revocation or suspension. In the circumstances of this particular case, therefore, we find the omission to be error and the assertion that the finding is deficient to have merit. Accordingly, Finding of Fact V is reversed.

3. THE DETERMINATION OF PENALTY WITH REGARD TO THE FINDINGS OF LATE REPORTING AND CHARGING EXCESSIVE REGISTRATION FEES (FINDINGS III, IV, AND VI) IS NOT COMMENSURATE WITH THESE FINDINGS.

We have duly weighed all of the circumstances in this case in our consideration of the validity of this basis of appeal. We note the number of late reports and excessive fee violations in the accusation to be relatively few compared to the volume of business transacted by this dealership. Admittedly, there are some aggravating circumstances but it appears that overcharges were unintentional, due to oversight or clerical error, and the reporting violations were in large part the result of ignorance of the law and reliance by the appellant's president on employees whom he believed to be highly competent. While these reasons do

not excuse the acts of the appellant, we do find that they provide a basis for mitigation of the penalty.

Consequently, while we agree that the penalty should include suspension, we would modify it by reducing the period for each of Findings III and IV, separately and severally considered, from 15 days to 5 days, and further modify the penalty by staying the entire period of suspension of 5 days for each of Finding III, IV and VI (to run concurrently for a total suspension of 5 days) for one year. As thus modified, we deem the penalty to be commensurate with the findings.

For the reasons stated, Findings of Fact V and VII and Determination of Issues (d) are reversed. Findings of Fact III, IV and VI and Determination of Issues (a), (b) and (c) are affirmed.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER IS HEREBY MADE:

The vehicle dealer's license, certificate and special plates (D-6) heretofore issued to appellant, William L. Hughson Co., Inc., dba Hughson Ford Sales, a California corporation, is suspended for a period of 5 days as to each of Findings III, IV and VI, each separately and severally considered, said suspensions to run

concurrently for a total suspension of five (5) days; provided further, that the entire suspension of five (5) days is stayed for a period of one year from the effective date of this final order during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective August 9, 1974.

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

ROBERT A. SMITH

JOHN B. VANDENBERG

MELECIO H. JACABAN

D I S S E N T

We dissent as to penalty. The transcript of the record reveals a consistent callous attitude on the part of the appellant herein as to its responsibility for complying with all laws that relate to its operation of the business and under which it is a licensed dealer in the State of California. At the administrative hearing, appellant's president testified inter alia that he operated the business for profit irrespective of what violations might occur; that he had 110 employees; that he did not review the rules and regulations sent by the department; nor was he familiar with the laws regulating his business; and that all documents relating to the handling of "DMV" work were passed onto his employees. Further, there is no indication that he made any personal effort to effect or insure corrective action.

It is our opinion that the total suspension herein should not have been stayed and that appellant should have been denied

This Final Order shall become effective _____.

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This Final Order shall become effective [signature].

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MELECIO H. JACABAN

D I S S E N T

We dissent as to penalty. The transcript of the record reveals a consistent callous attitude on the part of the appellant herein as to its responsibility for complying with all laws that relate to its operation of the business and under which it is a licensed dealer in the State of California. At the administrative hearing, appellant's president testified inter alia that he operated the business for profit irrespective of what violations might occur; that he had 110 employees; that he did not review the rules and regulations sent by the department; nor was he familiar with the laws regulating his business; and that all documents relating to the handling of "DMV" work were passed onto his employees. Further, there is no indication that he made any personal effort to effect or insure corrective action.

It is our opinion that the total suspension herein should not have been stayed and that appellant should have been denied

operation for some period of time to make it aware of the seriousness of its responsibility as a licensed dealer under the laws of the State of California.

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